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REPORTS

Guillemi *Ex* AND *Libri* *Scian*
CASES,

COLLECTED BY THE LEARNED,
SIR JOHN POPHAM,
KNIGHT,
Late LORD CHIEF-JUSTICE
OF
ENGLAND.

Written with his own hand in *French*, and now faith-
fully Translated into English.

To which are added some Remarkable CASES Reported by
other Learned Pens since his death.

*With an Alphabeticall Table, wherein may be found the Principall Matters
contained in this Booke.*



L O N D O N,
Printed by Tho: Roycroft, for Henry Twysford and John Place, and are to
be sold at their Shops in Vine-Court Middle Temple, and at
Furnivals Inne Gate in Holborn: 1656.

REPORTS

AND
CASES

COLLECTED BY THE EDITOR
SIR JOHN ROBINSON

IN THE
LORD CHIEF JUSTICE

END.

Rec. May 13, 1913.

Which with his own hand, and now faith-

to which are added some remarkable cases reported by

with his own hand, and now faith-

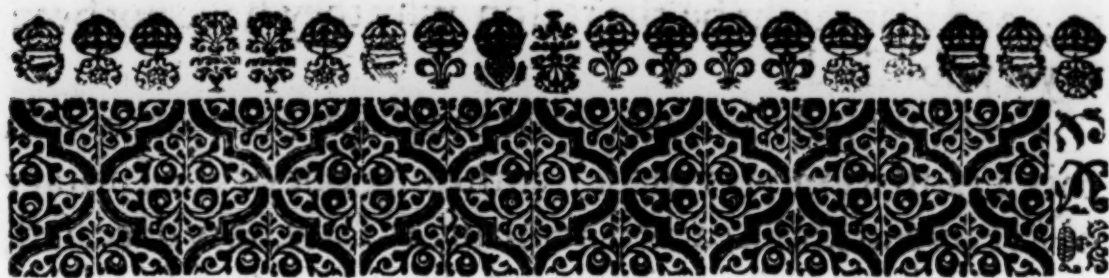
to which are added some remarkable cases reported by

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TO THE
READER.

Courteous Reader,

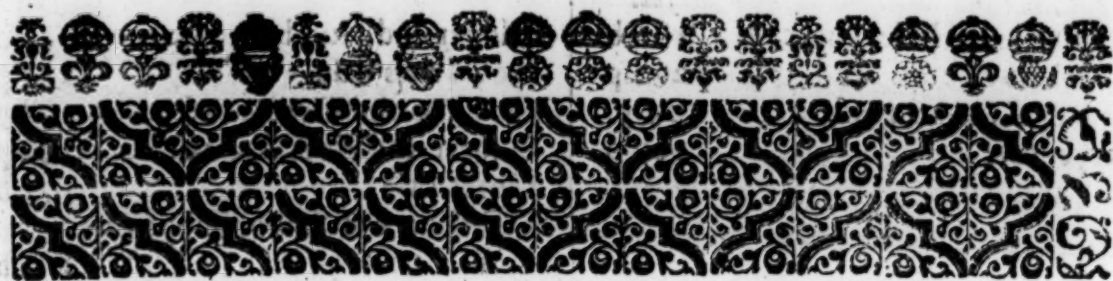


Lbeit the name of the Compiler of the greatest part of the ensuing REPORTS (for *Denominatio fit a parte majori & meliori*) would be a sufficient invitation to any understanding Reader, not only to cast his Eye upon, but seriously to peruse them; yet because these two Questions may (and no doubt will, and that upon good ground) be made: as, 1. Why they should lye so long in private hands, vvithout being exposed to the publique viewv? 2. Why they should be now Printed?

To the first I answer, That by the handsome composition and connexion of them, it may (and that very probably) be conjectured, that the honourable Compiler at first intended them for the publique, but they (after his death) coming into private hands, they who became possessors of them, did rather intend their owne, and their friends private knowledge and advantage by them, then to let others communicate therein, for it hath not formerly been (neither yet is) a thing unusuall, for the great and learned Professors of the Law, to ingrosse into their owne hands, the best and most authentick REPORTS, for their better help, credit, and advantage in the course of their practise, which being unknown to other men, they cannot upon sudden occasions, be ready to make answer thereun-

to ; and that might be the reason why they have not been as yet published.

To the second I answer, that the Copy (out of which this Translation was made) comming out of the Library of a reverend and Learned Sergeant at Law now deceased, and said therein to be written with the proper hand-writing of the Lord POPHAM (a good ground to conceive that it was Authentick) the Gentleman in whose hands it was, was earnestly importuned for the Copy, that so it might be made publique, to whose importunity there was at last a concession, so as such due care might be taken both in the Translation and Printing, as not to prejudice the Author, or the matter therein contained : And whether that condition be fully performed, shall be now left to the candid interpretation of the judicious Reader, who cannot but know that some *Errata's* (let the Printer or Correcter be never so carefull) will follow the Presse; but it is hoped that nothing materiall or substantiall is committed or omitted to the prejudicc of the Work, or of the Compiler thereof. There is an addition of some later Cases in the time of King JAMES, and the late King CHARLES, which were taken by judicious Pens, as will evidently appear by the Cases themselves ; and I dare say, that whoever reads them, will neither think his Time or Money mispent, they being such as are well digested, and very practicall. I shall adde this one thing more, that the principall end of this Edition is, the advancement of knowvledge, and to impart the good thereof to those who heretofore vvanted vvhat is hereby made publick, vvwhich may (peradventure) be a means to invite others more learned to publish other things of the like nature, for the benefit of Students, and Professors of the Lavv.



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and other CASES vouched in this
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Reported by

SR. JOHN POPHAM Knight,
Lord chief Justice of ENGLAND,

In the time of Queen ELIZABETH; and written
with his own hand in *French*, and now faithfully done into *English*: to which are added some remarkable CASES, Reported
by other Learned, and Judicious Pens, since his death.

Fenner *versus* Fisher.

Mich. 34. and 35. Eliz. Regina, in the Kings Bench

I. **T**respasse brought by Justice Fenner against Andrew Fisher, for a Trespasse done in the Parsonage house of Crayfords in the County of Kent, 30. Maij 34. of the Queen, the Defendant pleaded that one was seised of the same Messuage in his Demesne as of fee, and being so seised, the day of, in the same year, did demise it to the Defendant for two years, from such a Feast then last past; by virtue of which he entred and was possessed, untill the Plaintiff claiming by colour of a Deed made of the sayd Wright where nothing passed by the Deed, upon which the Defendant entred, &c. The Plaintiff replies by protestation, that the sayd Wright was not seised as the Defendant hath alledged: And for Plea saith, that the sayd Wright did not let it to the Defendant, as the Defendant hath alledged; upon which being at Issue, and found for the Plaintiff, Ackinson moved, that Judgment ought not to be given for the Plaintiff, because that he hath not made any Title by his Replication, for by 9 E. 4. 49. In Trespasse the Defendant pleads in Bar and gives colour to the Plaintiff; it is taken for a Rule that the Plaintiff ought to make Title: Cook answered, that he needs not to make Title in this case, but that it sufficeth to traverse the Bar without making a Title, and says that in 22 E. 4. Fitzh. Trespas, It is adjudged that in Trespasse the Plaintiff may traverse the Bar without making Title in his Replication; and here in as much as it is acknowledged by the Defendant, that Wright did demise it to the Plaintiff, and that this is a Lease at will at the least not defeated by his own shewing, but by the Lease made to the Defendant, this being traversed and found against the Defendant. The Plaintiff by the acknowledgment of the Defendant himself, hath a good Title against him to enter into the Land, and by it the Defendant by his Re-entry is become Trespasor to the Plaintiff; and he says, that in 2 E. 4. fol. In Trespasse where the Defendant pleads that he let the Land to the Plaintiff for another mans life, and that he

for whose life it was, was dead, upon which he entred, and it is adjudged that it sufficeth for the Plaintiff to maintain that Cethuy & vic was yet living without making any other Title: And yet these reasons Clench and Gawdy held the Replikation good, to which Popham sayd, that we as Justices ought not to adjudge for the Plaintiff where a good & formall bar is pleaded as here it is. But whereby the Record it self which is before us, we cannot see that the Plaintiff hath good cause of Action: And therefore I agree that in Trespasse in some cases the Plaintiff may traverse the Bar, or part of it, without making any other Title then that which is acknowledged to the Plaintiff by the Bar, but this alwaies ought to be where a Title is acknowledged to the Plaintiff by the Bar, and by another means destroyed by the same Bar, for there it sufficeth the Plaintiff to traverse that part of the Bar which goeth to the destruction of the Title of the Plaintiff comprised in the Bar, without making any other Title, but if he will traverse any other part of the Bar, he cannot do it without making an especiall Title to himself in his Replikation, where by the Bar the first possession appeareth to be in the Defendant, because that although the Traversal there be found for the Plaintiff, yet notwithstanding by the Record in such a Case the first Possessions will yet appear to be in the Defendant, which sufficeth to maintain his Regresse upon the Plaintiff, and therefore the Court hath no matter before them in such a Case to adjudge for the Plaintiff, unlesse in cases where the Plaintiff shewes a speciall Title under the Possession of the Defendant; As for example, In trespassse for breaking of his Close, the Defendant pleads that J. G. was seised of it in his Demesne as of fee, and enfeoffed J. K. by virtue of which he was seised accordingly, and so being seised, enfeoffed the Defendant of it, by which he was seised, untill the Plaintiff claiming by colour of a Deed of Feoffment made by the sayd J. G. long before that he enfeoffed J. K. (where nothing passed by the sayd Feoffment) entred, upon which the Defendant did re-enter, here the Plaintiff may well traverse the Feoffment supposed to be made by the sayd J. G. to the sayd J. K. without making Title, because that this Feoffment only destroyes the Estate at will made by the sayd J. G. to the Plaintiff, which being destroyed he cannot enter upon the Defendant, albeit the Defendant cometh to the Land by Disseisin, and not by the Feoffment of the sayd J. K. for the first Possession of the Defendant is a good Title in Trespasse against the Plaintiff, if he cannot shew or maintain a Title Paramount. But the Feoffment of the sayd J. G. being traversed and found for him, he hath by the acknowledgment of the Defendant himself a good Title against him, by reason of the first Estate at will acknowledged by the Defendant to be to the Plaintiff, and now not defeated: But in the same case he cannot traverse the Feoffment supposed to be made to the sayd J. K. to the Defendant, without an especiall Title made to himself; for albeit that J. K. did not enfeoff the Defendant, but that the Defendant disseised him, or that he cometh to the Land by another means, yet he hath a good Title against the Plaintiff by his first Possession, not destroyed by any Title Paramount, by any matter which appeareth by the Record, upon which the Court is to adjudge; and with this accord the opinion of 31 E. 4. 1. That the materiall matter of the Bar ought alwaies to be traversed, or other wise that which upon the pleading is become to be materiall, and that which the Plaintiff traversed here, to wit, the Lease made by Wright to the Defendant is the materiall point of the Bar which destroyeth the Title Paramount acknowledged to the Plaintiff by the colour given in the Bar which is good without another Title made: So note well the diversity where in pleading in Trespasse the first Possession is acknowledged in the Plaintiff by the Bar, and where it appeareth by the pleading to be in the Defendant, and where, and by what matter the first Possession acknowledged in the Plaintiff by the Bar is avoided by the same Bar; And upon this, Judgment was given for the Plaintiff, as appeareth in 34. and 35. Eliz. Rol.

Earl of Bedford, *versus* Eliz. & Anne Russell.
Mich. 34. and 35. Eliz.

2. **I**n the Court of Wards, the Case was thus, between the now Earl of Bedford, and Elizabeth and Anne the Daughters and Heirs of John, late Lord Russell, which was put ten times to all the Justices to be resolved: Francis late Earl of Bedford, was seised of the Mannors of Barunke Chaldon, &c. in Committu Dorset, in his Demesne as of fee, and so seised the fourth year of Queen Eliz. of it enfeofed the Lord S. John of Blesfor, and others in fee, to the use of himself for forty years, from the date of the sayd Deed, and after to the use of the sayd John then his second Son, and the Heirs Males of his body; and for default of such Issue, then to the use of the right Heirs of the sayd Earl the Feeffor for ever: Afterwards Edward Lord Russell Son and Heir apparant to the sayd Earl dyed without Issue, and after the sayd John Lord Russell dyed without Issue Male, having Issue the sayd two Daughters, afterwards to wit 27 Eliz. the sayd Francis Earl of Bedford, by Indenture made between him and the Earl of Cumberland and others in consideration of the advancement of the Heirs Males of the body of the sayd Earl, which by course of descent should or might succeed the sayd Earl, in the name and dignity of the Earldome of Bedford, and for the better establishment of his Lordships Mannors and Hereditaments, in the name and blood of the sayd Earl, covenanted and granted with the sayd Covenantors, that he and his Heirs hereafter shall stand seised of the sayd Mannors (amongst others) to the use of himself for life, without impeachment of Waste, and after his decease to the use of Francis the Lord Russell, and the Heirs Males of his body; & for default of such Issue, to the use of Sir William Russell Knight, his youngest Son, and the Heirs Males of his body, with diverse Remainders over: after which the sayd Francis, Lord Russell dyed, having Issue Edward the now Earl of Bedford, and after this the sayd Francis late Earl of Bedford dyed also, and after the Daughters of the sayd John Lord Russell, or the now Earl of Bedford, shall have these Mannors of Barunke, &c. was the question, and upon this it was argued by Cook, Sollinton and others, for the Daughters, that an use at Common-law, was but a confidence put in some to the benefit and behoof of others, and that Conscience was to give remedy, but for these for whose avails the confidence was, and that was in this Case, for the sayd Daughters which were the right Heirs to the sayd Francis late Earl of Bedford, upon the first conveyance made 41 Eliz. for the confidence that he put in the Feeffees, as to the profits that he himself was to have, was but for the forty years, and how can any other say that he shall have any other Estate, when he himself saith, that he will have it but for forty years; and therefore in this case his right Heir shall take as a Purchasor, by the intent of the Feeffor which hath power to make a disposition of the use at his pleasure, and his pleasure (as appeareth) was to have it so, and it is not as if the use had been limited to be to himself for life with such a Remainder over, in which Case the use of the Fee by the operation of Law ought to execute in himself for the Freehold which was in him before: As where Land is given to one for life, the Remainder to his right Heirs, he hath a Fee-simple executed, but here he shall have but an Estate for forty years precedent, and that the Fee-simple cannot be executed by such a limitation made to the right Heirs; but in case of an Estate for years only precedent such a limitation to his right Heirs afterwards is not good, but in case of an use it is otherwise, for it may remain to be executed, to be an use in Esse where the right Heir shall be, and therefore not to be resembled to an Estate made in Possession. And an Use is alwaies to be guided according to that which may be collected to be the purpose and intent of the parties: And therefore if a man make an Estate of his Land without limitation of any Use or confidence, the Law shall say that it is to his own use, but if it be upon confidence then it shall be to the

In the Court
of Wards.

whether

the Use of the party to whom it is made, or according to the confidence which shall be absolute, or according to that which is limited, which may alter that which otherwise shall be taken upon the generall confidence, as 30 H. 6. Fitz. Devile, If a man devise Lands to another in Fee, he hath the use and Title of it, but if it be limited to his use for his life only, the use of the Fee shall be to the Heir of the Devisor, for by the limitation his intent shall be taken to be otherwise, then it should be taken if this limitation had not been; and in as much as in this case the Earl reserves to himself but the use for years, it is evident that his intent never was to have the Fee, to surrender this Term, which perhaps he intended to be for the benefit of his will, which shall be defeated contrary to his purpose, if the Fee shall be also in him by the death of the sayd John, without Issue Male, and therefore the sayd Daughters ought to have the Land. And on the other part it was argued by Glanvill Serjeant, and Egerton the Attorney Generall, that this limitation made to the right Heirs, is void in the same manner, as if a man give Lands to another for life, the Remainder to the right Heirs of the Feoffor, in this case the Heir shall take by descent as a Reversion remaining to the Feoffor, and not as a Remainder devested out of him, for the ancient right priviledge the Estate which he may take, and therefore he shall take it by descent and not by purchase; for the name of right Heir is not a name of purchase betwixt the Ancestor and his heir, because that doth instance that he happeneth to be heir, he takes it by descent, and then it comes too late to take by purchase; And another reason that the Daughters shall not have it is, because that when Sir John Russell dies without Issue Male, which Estate might have preserved the Remainder, if it shall be a Remainder, there was not any right heir of the sayd Francis Earl of Bedford to take this Remainder, because that the sayd Earl survived him: And therefore it is to bee resembled to this Case; Land is given in Tail, the Remainder to the right Heirs of J. C. the Donee dyes without Issue in the life of J. C. in this case, albeit J. C. dyes afterwards having an heir, yet this heir shall never have the Land, because he was not heir in Esse to take it when the Remainder fell, and for the mean Estate for years this cannot preserve a Remainder, no more then when Land is given for years, the Remainder to the right heirs of J. C. this Remainder can never be good if J. C. be then living, because such a Remainder cannot depend but upon a Free-hold precedent at least, and therefore the Inheritance here shall go to the now Earl of Bedford by the second assurance. And upon consideration of the Case and severall Confirmes had upon this amongst the Judges and Barons, it was at last resolved by all (but Baron Clarke) that the Daughters shall not have the Mannors in the County of Dorset, but the now Earl of Bedford, and principally upon this reason, because there was no right Heir to take as Purchasor where the mean Estate Taile was determined, which was by the Lord John, without Issue Male, for they agreed that the Remainder to the right Heirs if it be a Remainder cannot be preserved by the mean Estate for years, for it ought to be a Free-hold at least which ought to preserve such a Remainder, untill there be one to take it by name of Purchasor as right Heir. And at this day they did not think there was any diversity between the Case of a Remainder in Possession limited to the right heir of one, and of a Remainder in use so limited over to another.

Mich. 34. and 35. *Eliz.*: In the Kings Bench.

3. **I**n Ejectione finium upon speciall verdict the case was thus, A man possessed of a Term of years in right of his wife, made a Lease for years of the same Land to begin after his death which was the Lessor, and afterwards he dyed and his wife survived him, and the question was, whether the wife shall have the Land after the death of the husband, or the Lessee, for if the husband had devised

vised the same Land to an estranger, yet the Wife shall have it and not the Deviser, as it happened in the Case of Matthew Smith, who made first such a Devise of a Term of his Wife, and yet the Wife had it; because that by the death of the husband (before which the Devise did not take effect) the wife had it in her first Right not altered in the life of her Husband; but it was agreed in this case by all the Court, that the Lessee shall have it during his Term, for as the husband during his life might contract for the Land for the whole term which the wife had in it, so might he do for any part of the term at his pleasure, for if he may devise the Land for one and twenty years to begin presently, he also may make it to begin at any time to come after his Death, if the term of the Wife be not expired, but for the Remainder of the term of the husband, made no disposition during his life, the Wife shall have it, which by Popham this Case happened upon a speciall Verdict in the County of Somerset, about 20 Eli. Where he and Sergeant Baber were Practisers in the Circuit there, to wit, the Lands were demised to husband and wife for their lives, the Remainder to the Survivor of them for years, the Husband granted over this term of years and dyed, and the question was whether the Wife shall have the term of years or the Grantee, and adjudged that the Wife shall have it, and it was upon this reason, because there was nothing in the one or the other to grant over, untill there was a Survivor: And the same Law had been if the Wife had dyed after the Grant, and the Husband had survived, yet he shall have the term against his own Grant; as if a Lease were made for Life, the Remainder for years to him which first cometh to Pauls, if A. grant this Term for years to another, and afterwards A. is the first which cometh to Pauls, yet the Grantee shall not have this Term because it was not in A. by any means neither in Interest nor otherwise untill he came to Pauls: As if a man make a Lease for life, the Remainder to the Right heirs of J.S. J. S. hath Issue a Son which selleth this Remainder, and afterwards I. S. dyed, this Son being his Heir notwithstanding his Sale, he shall have this Remainder & not his Grantee, because it was not in him at the time of his Grant, but by a matter which cometh, Ex post facto, to wit the death of his Father, and afterwards Judgment was given in the first case, that the Grantee shall have the term granted to him by the Husband, and that the Wife shall not have the term during this Lease

Hunt *versus* Gateler.

Mich. 34. and 35 Eliz. in Commun. Banco.

In a Replevin between Hunt Plaintiff, and Gateler Abowant in the Common Pleas, which was adjoined for difficulty into the Exchequer Chamber, the Case was thus, Tenant in tail, Remainder in Fee, he in Remainder in Fee grants a Rent-charge in Fee out of the same Land, to begin after the Estate tail determined, Tenant in Tail suffer a common Recovery with a Voucher over, to the use of the sayd Hunt in Fee, and dyed without Issue inheritable to the intail, and whether Hunt shall now hold the Land charged with the Rent, was the question; and after that it had long depended, and was many times argued in the Common Pleas, and Exchequer Chamber, at Hertford Term it was at last resolved by all the Justices and Barons unanimously, that the sayd Rent charge was gone by the Recovery, although the Estate tail was expired, because that he which is in, is in under this Intail: And therefore Popham sayd, suppose that the Tenant in tail himself before the Recovery had granted a Rent charge out of the same Land, or had made a Lease for years, or had acknowledged a Statute, all these had been good, and to be executed against him which cometh in under the Recovery, notwithstanding that the Estate tail had been determined for want of an heir inheritable to

*Vide this case
Cook lib. 1. 1361;
by the name
of Capels case.*

to the intail, for he which recovereth cannot say that he against whom he recovered had but an Estate in tail, and if his Lease remain yet good (as all agreed it did) how can the Lease, a Rent granted by him in the Remainder, be good also, for the one and the other cannot stand together, and therefore all the Leases, Charges, or Statutes acknowledged or made by him in the Remainder, are gone and avoided by the Recovery had against Tenant in tail. To which opinion all the other agreed, and Popham said further, That he in the Remainder upon an Estate tail, cannot by any means plead to defend his Remainder, unless the Tenant will as by vouching of him, and therefore shall be bound by the Act of Tenant in Tail, where the Estate itself is bound as here it is by the Voucher, and then they which come in by him in the Remainder by way of Lease, Charge, or Statute, (which are not so much favoured in Law as Tenant in tail himself) be in better condition then he in the Remainder himself is; for he in the Remainder upon an Estate tail cannot put more into the Mouth of the Lessee or Grantee to defend their Estates, then he himself could have to defend his Remainder, and this is the reason that such a Termor or Grantee shall never falsifie the Recovery had against Tenant in tail, as the Grantee or Termor shall do which cometh in under Tenant in tail against whom the Recovery was had, for there as the Tenant in tail may plead to defend his Possession and Estate, so may his Termor or Grantee of a Rentcharge do, for by the Demise or Grant made, the Tenant in tail hath put all the Pleas into their mouths for their Interests which he himself had to defend his Right and Possession, which they may plead for the time to defend their Possessions and Rights as well as the Tenant in tail himself may do, and this is the reason that such may falsifie Recoveries against their Lessors or Grantees, if they be not had upon the meer right Paramount, which he that cometh in by such a Remainder as before cannot do, for such a one in Remainder cannot be received to defend his Right, but his mouth is meerly foreclosed to do it, and by the same reason are all those which come in by such men foreclosed to defend their Interests or Estates, and upon this Judgement was given in the same Term in the common Pleas.

Gibbons *versus* Maltyard and Martin.

Vide this case
in Cook lib. 8.
130. Thet-
ford Scholies
case.

In an Ejectione firmæ, brought in the Kings Bench by John Gibbons Plaintiff, upon a Demise made by Edward Peacock the Son, of Lands in Croxton, in the County of Norfolk, against Thomas Maltyard and John Martin, upon a speciall verdict, the case appeared to be thus, to wit, that Sir Richard Fulmerston Knight, was seised of the sayd Lands (amongst others) holden in soccage in his Demesne as of Fee, and being so seised by his last Will in Writing, made 9 Eliz. Ordained that a Deviser shall be made by his Executors that a Preacher shall be found for ever to preach the Word of God in the Church of Saint Maries in Thetford, four times in the year, and to have for his Labour ten shillings for every Sermon. And further he devised to his Executors and their heirs certaine Lands and Tenements in Thetford aforesaid to this intent; and upon this condition, that they or the Survivors of them within seven years after his decease, should procure of the Queens Highness to erect a free Grammar School in Thetford for ever to be had and kept in a house by them to be erected upon part of the sayd Land, & that they shall assure three of the said tenements for the house and Chamber of the Schoolmaster and Wsher, and their Successors for ever, and for the other tenement, that they shall make an assurance of it for the Habitation of four poor people (two men and two women) for ever. And for the better maintenance of the sayd Preacher, Schoolmaster, Wsher, and Poore people, he

he devised (amongst others) his sayd tenements in Croxton to his Executors for ten years for the performance of his Will, and after this he devised them to Sir Edward Cleer, and Frances his Wife (the Daughter and Heir of the sayd Sir Richard, and to the Heirs of the sayd Sir Edward, upon Condition, that if the sayd Sir Edward his Heires or Assignes, before the end of the sayd ten years shall assure Lands or Tenements in possession to the value of five and thirty pounds a year, to the sayd Executors or the Survivor of them, their Heirs and Assignes, or to such persons their heirs or Successors as his sayd Executors or the Survivor of them shall name or assigne for and towards the maintenance of the sayd Preacher, Schoolmaster, and Alther, in the sayd School house, &c. and for the releif of the sayd poor people in the one of the sayd houses, according to the Ordinance as he himself in the sayd Will had declared, or otherwise as by his Executors or the Survivor of them shall be prescribed. And if the sayd Sir Edward and his Heirs shall make default in the assurance of the sayd Land by him to be assured as aforesayd, then hee will that immediately upon such default, his Estate, and the Estate of the sayd Frances shall cease in the sayd Lands in Croxton, &c. and then he devise the same Lands to his Executors and their Heirs for ever to the use of them and their heirs upon trust and confidence that they or the Survivor of them and their Heirs shall assure the same, or otherwise yearly dispose the profits of them in finding the sayd Preacher and other charitable works as aforesayd, and made Edward Peacock Father to the Lessor, (whose Heir the Lessor is) and others his Executors, and dyed 9. of the Queen, after whose Death all the Executors refuse to be Executors. The seven years passe without the establishing of the School, and other things according to the Will for the first part of it, whereby the Land in Thetford was forfeited to the heir for the Condition broken, and within the ten years Sir Edward Cleer made a Feoffment of Land to the value of 35 l. a year to the surviving Executor, for the use of the School, but with a condition contrary to the Will, and no Liberty was made upon the sayd Feoffment, but it was inrolled of Record in the Chancery, whereby the sayd Sir Edward had broken the Condition annexed to his Estate, and also during all this time neither the Executors nor their Heirs had done any thing in finding the Preacher or the other works of charity with the profits of the sayd Lands in Croxton, or in assuring of it according to the Will, and yet the sayd Edward Peacock the Son in September 32. Eliz. being Heir to the surviving Executor, entred into the Land in Croxton, and demised it to the Plaintiff for seven years, upon which the Defendant as Servant, and by the commandment of Sir Edward Cleer, and of Edmund the Son and Heir of the sayd Frances (who was then dead) entred; upon which entry and Ejectment the Action was brought, and it was moved by Godfrey and others that the entry of the Defendants was lawfull, first in the right of the sayd Sir Edward, because that his Estate by the Statute of 23. H. 8. cap. was without condition, or determined; because that by this Statute all the uses limited in such a manner are made void, because they are in the nature of a Mortmain, as may appear by a Proviso at the end of the same Statute for a certain person of Norwich who had Devised Lands for the ease of the poor Inhabitants of the same City, in Taxes and Tallages, and for cleansing of Streets there and for discharge of toll, and Custome within the City, all which were good uses, and not tending to Superstition, and yet if it had not been for the Proviso they had been gon by the body of the Statute: And the Statute ordained also, that every penalty and thing which shall be devised to defraud this Statute shall be void; and if this do not help them, yet the Entry made in the right of the sayd Heir, of Sir Richard Fulmerston, is good; for the estates of the sayd Executors are also bound as with a tacite condition that these things shall be performed which are not done, and therefore the entry in right of the
heir

heir is lawfull, for the words *Ad propositum, ea intentione*, and the like in a Will are good Conditions which Gaudy agreed, & vouched the case 28. Ass. Pl. but it was after often argument agreed by all the Court that the first exception was to no purpose, for they conceived that this Statute was to be taken to extend only to the uses which tend to Superstition, as might be collected as well by the words of it in the very body of the Act at the beginning, as by the time in which it was made, for at this time they began to have respect to the ruine of the authority of the Pope, and to the dissolution of the Abbies, Chantries, and the like: And by Popham, the *Devise* was put in the Statute, but for satisfaction of the Burgeses of the same City at this time, and not for any necessity as oftentimes it happens. And for the other point, he sayd, that it appeareth fully by the Will that it was not the intent of the sayd Sir Richard to have the Land in Croxton bound with any condition in the possession of his Executors, or with any other matter which determine their Estate, for the Words, that they shall have it upon trust and confidence, exclude all constraint which is in every condition, and the Will is, that they shall have it to the use of themselves and their Heirs for ever, which cannot be if it shall be abridged by any Limitation or Determination: And he sayd, that the Lord Anderson demanded of him a Case which was adjudged in the Common Pleas 29. Eliz. Rot. 639. which was thus, One Michel made a Lease for years rendring Kent, and for default of payment a re-entry, with Covenants on the part of the Lessee to repair the Messuages, &c. and the term continuing, the sayd Michel, by his Will in Writing, devised the same Land to the sayd Lessee for more years then hee had to come in it, rendring yearly the like Kent, and under the same Covenants which he now holds it, and dyed, and afterwards the first term expired, the Lessee does not reaire the Houses, and the question was, whether by this he hath forfeited his term, and adjudged that as to this it was not any condition, and a Covenant it could not be, for a Covenant ought alwaies to come on the part of the Lessee himself, which cannot be in this case, for he doth not speak any thing in the Will to bind him, but they are all the words of the Devise himself which comprised in a Will, and it never was his intent to have it to be a condition, and therefore void as to the Lessee to bind him either by way of Covenant or Condition, so here, &c. And for the sayd Feoffment enrolled without Livery, it was agreed by all, that it was not of any force to make the Land to passe to the Executors, but the enrolment conclude him to say not his Deed; And also that the Executors refuse to be Executors, this shall not hinder them to take by Devise as to the Inheritance, whereupon it was adjudged that the Plaintiff shall recover as appears.

Thomson *versus* Trafford.
Hilary Term 35 of Queen Elizabeth.

In an Ejectione firmæ, between John Thomson Plaintiff, and Thomas Trafford Defendant, the case was thus, The President and Schollers of Magdelen Colledge in Oxford, 20 Decemb. 8. Eliz. Did let a Messuage in the Burrough of Southwark, to which no Land appertained to William Standish for twenty years, from the Feast of Saint Michael next ensuing, rendring the ancient Kent, and 25. Octob. 21. Eliz. they did let the same Messuage to the same Standish for twenty years from the Feast of Saint Michael then next ensuing, rendring also the ancient Kent, and 31 August 30. Eliz. The President and Schollers made a new Lease of the same Messuage to Sir George Carew Knight, for twenty years, from making of the Lease rendring the ancient Kent, which Lease was conveyed by mean Assignments to the Plaintiff, upon which the Action was brought against the sayd Trafford which

whic h had the Interest of the sayd Standish by mean Assignments: Popham said, that Ipso facto upon the last Lease made, and annexed by Standish, the first Lease was determined and gone, for this last contract dissolves the first when the one and the other cannot stand together, as they cannot here, because the one intermix with the other, and so was the opinion in the Common Bench about 1 Eliz. in the case of the Abby of Barking, of which I have seen a Report.

And here Standish before Michaelmas, next after the second Lease made to him could not grant over his first term to be good to the Grantee, for if this should be, the second term shall not be good to Standish, but for the remnant of the years after, the first term finished, which cannot be because it standeth in the power of the Grantor with the assent and acceptance of the Grantee to make the second Grant good, for the whole term, to wit, from Michaelmas, and this cannot be but by a determination in Law of the first term immediatly, which is made by his own acceptance, and therefore a prejudice to none but himself, and Volenti non fit injuria, and the first Term cannot have his continuance untill Mich. but is gone presently by the acceptance of the second Lease in the whole, for the first contract which was entyre cannot be so dissolved in part, but in the whole, as to that which the party hath, and therefore the first Term (as the case is here) is gone in the whole, to which Clench and Gaudy agreed: And if so then this last Lease to Standish was but as a Lease made to begin at a time to come, which is made good by the Stat. of 14 Eliz. if it do not exceed the time of 40 years from the making of the Lease; for the purpose of this Act was, that Colledges and the like shall not make Grants in Reversion, albeit it be for a year, and the reason was, because that by such Grants in Reversion they shall be excluded to have their Rent of the particular Tenants for the time: And therefore in the case of the Countesse of Sussex, who had a Jointure assured to her for her life by Act of Parliament, with a Proviso, that the Earle her Husband might demise it for one and twenty yeares, rendering the usuall Rent, where the sayd Earle had made a Lease for one and twenty yeares, according to the Statute, within a yeare before the end of the same Lease, the said Earle made a new Lease of the same Land to Wroth his Servant for one and twenty yeares, to begin after the end of the former Lease, rendering the usuall Rent, and died, the said Countesse avoided this last Lease by Judgement given in this Court, because it shall be intended to be a Lease in Possession, which he ought to make by the Proviso, from the time of the making of it, otherwise by such perverse construction, the true intent of the Statute shall be utterly defrauded. But here to make a Lease for twenty yeares to one in Possession, and to make another Lease to another for twenty yeares, to begin after the end of the former Lease, is good, because that the one and the other do not exceed the forty yeares comprised in the Statute.

And the Justices of the Common Bench the same day at Sergeants Inn agreed to the opinion of Popham for the determination of the whole first Term, by the taking of the second Term by Standish.

Ward *versus* Downing.

In an Ejectione firmæ brought by Miles Ward against Robert Downing, the case was thus; Doe Robert Brown was seised of certain Lands in the County of Norfolk, in his Demesne as of Fee (which were of the nature of Gavelkind) and had Issue George his eldest Son, William his middlemost Son, and Thomas his youngest Son, and being so seised 6 Decem. 1559. made his Testament in writing, by which he devised the sayd Tenements in these words.

Item, I give unto Alice my wife the use and occupation of all my Houses and Lands, as well free, as copyhold, during her naturall life.

Item, I will, that George my Son shall have after the decease of his Mother all those my Houses and Lands, wherof the use was given to his sayd Mother for the term of her life, To have and to hold to him and his Heirs for ever, and if the sayd George dye without Issue of his body lawfully begotten, then I will my sayd Lands shall in like manner remain unto William my Son and his Heirs for ever. And I will that all such money as shall be payd of my Legacy by the sayd George, shall be allowed by the sayd William, to whom the sayd George shall appoint.

Item, I will, that if the sayd George and William depart the world before they have Issue of their bodies lawfully: Then I will that all my sayd Houses and Lands shall remain unto Thomas my Son and to his Heirs for ever.

Item, That if the sayd George shall enjoy my sayd Houses and Lands, then I will the sayd George shall pay out of the sayd Lands to William and Thomas his Brother 26 l. 13 s. 4 d. that is to say, at his first entry into the sayd Lands, to pay unto the sayd William his Brother 40 s. and so to pay yearly untill the sum of 13 l. 6 s. 8 d. be fully answered and payd, and then immediately to pay unto Thomas his Brother 13 l. 6 s. 8 d. to be payd unto the sayd Thomas, when the sayd William shall be fully answered by 40 s. a year, in like proportion as is aforesayd: And if my sayd Son George shall refuse to pay unto William and Thomas his Brother the summs of 26 l. 13 s. 4 d. in manner and form as is before limited; Then I will that all my Houses Lands and Tenements with the Appurtenances remain to William my Son and his Heirs for ever, paying therfore 26 l. 13 s. 4 d. viz. 13 l. 6 s. 8 d. to George my Son, and 13 l. 6 s. 8 d. to Thomas my Son, in such manner and sort as the sayd George shall pay if he should enjoy the sayd Lands: And if it fortune the sayd William to enjoy the sayd Lands, then the sayd William shall pay unto Thomas his Brother the whole sum of 26 l. 13 s. 4 d. as is aforesayd. After which the sayd Robert dyed seised of the sayd Tenements in question, and his sayd wife entred into them for her life by virtue of the sayd Will, in whose life-time the sayd George dyed without Issue, after which the sayd Thomas also, to wit, 9 Dec. 1576. made his Testament in writing, and of this made Mary his wife his Executrix, and dyed, having Issue Martha by the sayd Mary; Afterwards the sayd Alice the wife of the Devisor, the last of March, 32 Eliz. dyed, and after her death, to wit, the first of May 32 Eliz. the sayd William entred into the sayd Tenements, and was therof seised in his Demesne as of Fee-tail, and the sayd Mary in the life-time of the sayd Alice proved the Testament of the sayd Thomas Brown, and the sayd William did not pay the sayd 26 l. 13 s. 4 d. to the sayd Mary, nor any part therof according to the Will, and the sayd Martha being Daughter and Heir of the said Thomas therupon entred into the sayd Tenements, and did let the sayd Diversity of which the sayd Action was brought to the sayd Ward for two years, upon which the sayd Downing in the right and by the commandment of the sayd William re-entred, and expelled the sayd Plaintiff. but the conclusion

conclusion of the Verdict was not upon the expulsion, but only if the entry of the sayd Downing shall be adjudged lawfull, then they find the Defendant not guilty, and if it were not lawfull, then they find him guilty.

Fennor, the Estate of the sayd William is conditional by the Will, to wit, that he shall pay to Thomas the 40 Marks, according to the Will, because the Will is, that the sayd money shall be payd as is aforesaid, or before the sayd moneys which were to be payd, was expressly limited to be payd upon the forfeiture of his Estate: And further if it shall not be taken for a Condition, then Thomas hath no remedy for the money to be payd to him; and although it be limited to be payd but to Thomas, who was dead before the day of payment of it, yet it shall be taken as a duty limited to him which shall be paid to his Executors, because that a time certain is limited for the payment of it, to wit, when the Land is come to the sayd William, which is, by the death of the sayd Alice, but if no time had been limited for the payment of it, and they had died before the payment of it, it had been otherwise; And it being a condition in William, albeit it descend upon him, as well upon him as upon the Heir of the sayd Thomas, yet it remains a good Condition for the part of the Heir of the sayd Thomas, not determined by the descent of the other part upon the Heir of the sayd William.

And further he sayd, that here the Condition shall not be sayd to be broken, but upon refusall of payment by the sayd William, as in the case of George to whom it refers by the words (as is aforesaid) which refusall is not found, and therfore the Plaintiff shall be barred.

Clench, The Executors of the sayd Thomas know not when, nor at what place to demand it, and therfore he thinks that the sayd William ought to have tendered the money to the said Executrix at his perill.

Popham, The payment limited to be made by the said George is at his first entry after the death of Alice, and then to pay 40 s. and so yearly untill 40 Marks are paid to the sayd William, and therupon 40 s. yearly to the sayd Thomas, untill other twenty Marks are paid to him; so that this is the form of the payment, to wit, at his entry, as well for the place as the time, for it cannot be made at his entry, unless upon the Land it self, and therfore by the purport of the Will, the Land shall be taken for the place where the payment ought to be made, for avoiding the inconvenience which otherwise will ensue; As if I am bound to pay to you 20 l. upon your first coming to such a place, this place shall be taken for the place where the payment shall be made. And whereas it is said further in the Will, and so to pay yearly 4 s. untill the twenty Marks are paid to William, this payment also by the words (and so to pay yearly, &c.) shall be at the same place at the end of every year, upon the next day after the end of it, or otherwise there will be no certainty when it shall be paid, and therfore the first day of every year shall be the very day of payment, and this also by virtue of the said words (and so yearly) And at the last day of payment by George to William, or Thomas there ought to be paid but 26 s. 8 d. because that then there remains no more to be paid of the summs limited to be paid to them; And when the Will here hath finished with George for that which he is to pay, it goes further, and if he refuseth to pay the said summs to William and Thomas, in manner and form aforesaid, then he wils that all the said Lands shall remain to the said William and his Heirs for ever, paying yearly, &c. and so there is an express penalty to George if he refuse to make payment, to wit, that he shall lose the Land for default of payment made by George by the word (paying) annexed to the Estate which is a Condition, but he conceived that this last payment to be made to Thomas, is not to be made upon any penalty, nor that a Condition is to be implied in it, although Thomas hath no remedy for it, but in conscience, because it is a meer confidence put in William to pay it: And he said, that he was the rather moved to be of this opinion, because every one of the precedent

precedent Limitations was with an expresse Condition annexed to them, as to George, if he refuse, &c. But when William is to have but an Estate-tail upon the determination of the Estate made to George, for default of Issue there he saith nothing, but that the said William shall pay to the said Thomas soztie Parks, as is aforesaid, which is but a declaration of his intent, that he put confidence in him for the payment of it, and did not bind himself upon condition, as in the other cases, which he might have done by expresse words of condition, if his intent had been so, as well as he did in the other cases, if his purpose had been so; and the words, that he shall pay, as is aforesaid, is to be understood for the place and time when it shall be paid, according as George ought to pay it: And it doth not seem to stand with reason, to expound it, for a Condition to destroy the Remainder limited to the said Thomas; but if it shall be a Condition upon a relation, because of the words, that he shall pay it, as aforesaid mentioned, that the payment ought to be paid to the Executor of the said Thomas, albeit he died before the day of payment, because this was a sum in grosse limited to be paid to the said Thomas at a certain time. But if it shall be taken for a Condition in William, he thinks cleerly that the said William ought to have given notice to the Executor of the said Thomas before he had made his first entry into the Land of the Ten. when he intended to make his entry, so that the Executor might be there at the same time to have made demand of the money, which ought to have been done, or otherwise there cannot be a refusall in the said William, and without his refusall or other default in him, the Condition cannot be broken, if it had such a relation as to make the payment as George ought to do it: And so the Executor of Thomas cannot have notice when William will make his first entry into the Land, if he do not give him notice of it, and therfore if it shall be a Condition it had been broken on the part of William, for want of giving notice to the Executor of the time of his first entry, whereby the Executor might have notice of the time to make his demand, because without a demand refusall cannot be, and the Executor is excused to make demand when he had no notice of the time, and therfore the default of William in not giving notice of it shall be taken against him as strongly as if he had made a refusall to pay upon demand; for if notice had been given to the Executor, and he had demanded the money, and William had said nothing to it, but omitted to pay it, yet this shall be a refusall in Law.

But of this nothing appeareth in the Verdict, whether the Executor had notice given to him or not, nor nothing mentioned in the Verdict whether any demand or refusall was made of the money or not, and therfore the Verdict as to these points is incertain to judge upon, whether it shall be taken to be a Condition in William: But it seems as the Verdict is, that Judgment ought to be given against the Plaintiff, for the conclusion of the Verdict is upon the entry of the Defendant, whether this be lawfull or not, and not upon the expulsion, or whether upon the other Proverbie his entry was lawfull in right of the said William, because they were Tenants in Common.

3. **I**n Trespasse of Assault, Battery, and Imprisonment, made such a day
at in the Countie of Cornwall, brought by
against : The Defendant saith, that he was Constable of the
same Town, and that the Plaintiff the said day, year, and place, brought an
Infant not above the age of ten daies in his armes, and left him upon the
ground to the great disturbance of the people there being, and that he com-
manded the Plaintiff to take up the said Infant, and to carry it from them
with him, which the Plaintiff refused to do, for which cause he quietly laid
his hands upon the Plaintiff and committed him to the Stocks in the same
Town, where he continued for such a time, untill he agreed to take up the In-
fant again, which is the same Assault, Battery, and Imprisonment, of
which

which the Plaintiff complains, upon which the Plaintiff demurred. Fennor was of opinion that that, which the Constable did was lawfull, and that it is hard that an Officer shall be so drawn in question for it, for this shall be an utter discouragement to good Officers to execute their Offices as they ought to do. Popham, A Constable is one of the most ancient Officers in the Realm for the conservation of the Peace, and by his Office he is a Conservator of the Peace; and if he sees any breaking of the Peace, he may take and imprison him untill he find surety by obligation to keep the Peace: And if a man in fury be purposed to kill, maim, or beat another; the Constable seeing it, may arrest and imprison him untill his rage be passed, for the conservation of the Peace. And if a man lyes an Infant which cannot help it self upon a Dunghill, or openly in the field, so that the Beasts or Fowls may destroy it, the Constable seeing it may commit the party so doing, to Prison, for what greater breach of the Peace can there be then to put such an Infant by such means in danger of its life? And what diversity is there between this case and the case in question, for no body was bound by the Law to take up the Infant but he which brought it thither, and by such means the Infant might perish, the default therof was in the Plaintiff, and therfore the Action will not lye: And therupon it was agreed that the Plaintiff take nothing by his Writ.

Hayes *versus* Allen.

4. **T**erm. Pasch. 33 Eliz. Rot. 1308. A Cui in vita was brought in the Common Pleas, by Ralph Hayes against William Allen, of a Messuage with the Appurtenances in St. Dunstons in the East, London, in which it was supposed that the said Wil. had no entry, but after the demise which John Bradley, late husband to Anne Bradley, Aunt of the said Ralph (whose heir the said Ralph was) made to Tho. Allen and Jo. Allen, and counts accordingly, & shews how Cousin and Heir, to wit, Son of Wil. brother of the said Anne, Wil. Allen traverse the Demise made to the said Tho. and Jo. Allen, and at Nisi prius it was found, that the said Jo. Bradley and Anne his wife was seised in their demesne as of fee, in right of the said Ann, of a Messuage in S. Dunstons aforesaid, containing from the North to the South 18 foot, and from East to West 12 foot and a half, and being so seised during their Marriage, by their Deed, sealed with their Seals, enfeoffed the said Tho. Allen and Jo. Allen therof, to hold to them and their heirs, to the use of the said Jo. Bradley and Anne his wife for their lives, and afterwards to the use of the Churchwardens of S. Dunstons, Lond. and of their successors for ever, to the use of the poor of the same place, and that Liberty was made accordingly, and that the said Deed was inrolled in the Chancery at Westm. and that afterwards the said Anne died, and that Jo. Bradley survived her & died, and that the right of the said Mess. descended to the said Ra. as cousin and heir of the said A. And that Sir W. Allen K. was seised of a peece of land in S. Dunst. aforesaid, containing 6 foot 4 inches contiguous and adjacent to the said Mess. late the said Jo. Bradleys and A. his wife, in his demesne as of fee; And that the said Sir Wil. after the said feoffment, and before this Writ purchased, utterly drew away the said Messuage, late the said John Bradleys and Ann his wife, and drected a new house upon the Land of the said Sir William, and upon part of the Land upon which the other house stood, containing from the North to the South thirteen foot, & from the East to the West eighteen foot ten inches, which Messuage so newly built, stood the day of the Writ purchased, and yet stands. &c. And if upon the whole matter the said Demise of the said John Bradley and Anne be, and in Law ought to be adjudged the Demise of the said Messuage, newly built upon the said part of land, where the Messuage of the said John Bradley and Anne stood, then, the Jury find that the said John Bradley demised to the said Thomas and John Allen the said house newly erected as aforesaid, as the Plaintiff hath alleged, and if not, then they find that he did not demise.

And upon this Verdict Judgment was given there, and an especial Writ of Habere facias seisinam awarded of the said Messuage, with the Appurtenances; viz. 18 foot of it from the North to the South, and 12 foot and an half of it from the East to the West; upon which a Writ of Error being brought in the Kings Bench, it was alledged for Croz by Coke Solicitor, that upon this Verdict Judgment ought to have been given for the Tenant, and not for the Demandant, for what was remaining of that which was of the house, is not a house, but only a peece of a house, and therefore it ought to have been demanded by the name of a peece of Land, containing so much one way, and so much another; for a house wasted and utterly drawn away, cannot be demanded by a Messuage, but by the name of a Curtilage, or so much Land of such contents; for a Præcipe lies of a peece of Land containing so many feet in length, and so many in breadth: And also Land built during the possession of him which hath it by Tolt, cannot be demanded by the name of Land by him which hath right, but by the name of a house, nor e contra, for every demand of Land ought to be made according to the nature of which it is at the time of the Action brought, be it a Messuage, Land, Meadow, Pasture, Wood, &c. And if the Walls of a house be made upon the Land without any covering, yet it shall be demanded but by the name of Land; for he said, that it cannot be a house without its perfection to be habitable, which he said is not here, because it stands upon the Land of the said Anne, which hath not the perfection of a house habitable without the remnant. But this notwithstanding the first Judgment, was affirmed; for it was said by Popham, and other Justices, that, that which is erected upon the Land of the said Anne, shall be said a house as to the right of the Heir of the said Anne, for a house may be such to be demanded by the name of a house, albeit it hath not all the perfection of a house, as if it hath no doors, so if it hath part of the side walls not made, drawn away, or fallen, yet the remainder continues to be demanded by the name of an house; so if part of the covering be decayed, yet it shall be demanded by the name of an house, and the rather here, because with that which is upon the other Land it is a perfect house; And I may have a perfect house although the side Walls belong to another: as in London, where a man joynes his house to the side walls of his Neighbours, he hath a perfect house, and yet the side walls belong to another, and this commonly happens in London, but it is otherwise if it were never covered, or if the covering be utterly fallen, or drawn away, for without a covering a house cannot be said to be a house, for the covering to keep a man from the Storms and Tempests over head, is the principall thing belonging to a house.

And further, suppose that a man hath a Kitchen, or a Hall upon Land, to which another hath right, he which hath right ought to demand it by the name of a house: suppose then that there is adjoyning to this upon other land a Parlor, a Buttery, a Shop, a Closet, and the like, with Chambers over them, this doth not change the form of the Writ that he is to have which hath right, although before it was built by the name of a house, and yet as to the rent both the one and the other was but a house, but as to the demandant it is otherwise, for they are severall, so here: And the Demise which before was made of the house drawn away, shall be now upon the matter a Demise, as to this part of it a new Messuage; for if a man make a Lease for years of a house, and the Lessee pull it down, and erect there a new house, or if land be demised, and the Lessee build a house upon it, in an Action of Waste, for Waste done in this new house, the Writ shall suppose that he did waste in the Houses, &c. which were demised to him, and yet in the one case it is not the Messuage which was demised to him, and in the other the house was not demised, but the Land only; But he hath no term in the house but by the Demise before made: And it seems to Popham, that Allen the Defendant cannot pull down this part of the house erect upon his own land to the prejudice

of the house which Hayes demands, if this which is erected upon the land of Allen be of such a necessity, that without it the house of Hayes cannot stand for a house; but if he dies after that Hayes hath built it, then Hayes shall have an Action upon the case against him for the damages which he sustained by it: As if a man agree with me that I shall set the outer wall of my house upon his land, and I do it accordingly, and afterwards the party which grants me this licence, breaketh it down, if the Grant were by Deed I shall have an Action of Covenant for it, and if but by Paroll, yet I shall have an Action upon the case against him. And here this being done by him which was then Owner and Possessor of the one and the other land, it shall be taken as a licence in Law, to the benefit of him which hath right, which he cannot pull down after it is once made, but he shall be subject to Hayes his Action for it, or otherwise Hayes shall be at great mischief and prejudice by the Act of him which did the wrong, which the Law will not suffer, but rather shall turn this to the prejudice of him which did the wrong, then to the prejudice of the other which shall have wrong by the doing of it; for Volenti non fit injuria, As if I am to inclose between my Neighbour and my self, and my Neighbour pull down this inclosure or part of it, whereby my Cattell escape into the land adjoining, and depasture there, I shall be excused of this Trespasse in the same manner as if he had licenced me to have occupied it, and whatsoever hapneth to this Land adjoining by my Neighbours means, shall be in the same degree as my Neighbours Act, for what he does shall be to his own prejudice.

And upon the Judgment affirmed, the Attorney of the said Hayes made the like Writ of Habere facias seisinam, directed to the Sheriffs of London, as was done in the Common Pleas, whereupon it was affirmed to the Court in Hillary Term next ensuing, that the Sheriffs had made their execution by the quantity of the feet comprised in the writ, and that in the doing of it there was pulled down the part of another house of the said Allen which was erected two feet upon the land of the said Anne, and prayed remedy for it, and that this Habere facias seisinam varying from the thing recovered, might not be filed; To which it was said, that this quantity of feet was but a Surplusage in the Writ, and that the Writ before this was sufficient and warranted by the Verdict and judgment.

Sherrey *versus* Richardson.

5. **I**n Debt upon an Obligation of 50 l. by Lawrence Sherrey against Arnold Richardson, the case was this; 16 Martii 33 Eliz. the said Richardson was bound to Sherrey in 50 l. with condition to stand to and observe the Arbitrement, Award, order, rule, final end and judgment of one Walter Bolcon and Edward Price Arbitrators, indifferently elected to arbitrate, award, and judge of and for all Actions, Suits, Quarrels, and Demands whatsoever betwixt them, untill the date of the Obligation, so that it be made and done in writing under their hands and Seals, ready to be delivered to the parties, at, or before the last day of this instant month of April, and the said Arbitrators the last day of April, 33 Eliz. made an Arbitrement in writing under their hands and Seals, that within four daies next ensuing the award, either of the said parties shall release each to other all Actions, Suits, and Demands before the date of the said Obligation, with this Proviso, that if either of the said parties shall be discontented with the said Award, or any part of it, within twenty daies after the Award, that then upon the payment of 10 s. by the party which thinks himself aggrieved with the Award, to the other, within the twenty daies the Award shall be void, & either of them to be at liberty against the other as before the Award; and by the whole Court, if the Award shall be said made within the time comprised in the

the Obligation, where the Proviso had been to be performed after the four daies, it had been good, and a small Award, because that the Proviso to make the Award void after the time limited for making of Releases, is repugnant to that which was to be executed before, to wit, that either of them shall release each to other within four daies, for every Award ought to be reasonable and indifferent betwixt the parties in all appearance, and so that the one part of it ought not to impugn or encounter the other, and here to what purpose shall it be to make the Award void, and to put out at liberty against the other, when they have made Releases each to other, and what indifferency or reason should there be, that when one hath released, the other may dissolve the Arbitrement by the Proviso, and have may the Obligation which had been once forfeited by the not making of the Release within the four daies be helped and become not forfeited by dissolving of the Arbitrement by the Proviso. But by Popham, Gawdy, and Clench, if the Releases had been limited to have been made at a day to come, as ten daies after, and that the Proviso had been to have been performed in the mean time before these ten daies, then the Award had been void, because they had not pursued the submission, for it was no small end of the controversie, in as much as it is not certain by reason of the Condition, whether it shall be an end or not: But it seems to Popham, that the Award here is not made within the time that it ought to have been made by the Condition, for the Obligation is alledged to be made the 16 of March, 33 Eliz. and then no month can be the instant month but March, and therefore this word April is but a meer negation, and if it should not be so, to what April shall it refer: for there is no matter to guide it more to one April then another, but the generall intendment which happily shall guide it to the next April, for avoiding of incertainty, if it had not been for the words (this instant moneth) and the words (within this moneth) shall not be said to be frivolous & vain, where they may have a good and plain intendment, but rather the word (April) which is repugnant to it shall be said to be void and a meer negation; but it seems to him that as the Award is, the case being that at any time within 20 daies after the Award made, the one or the other disliking the Award, might have been defeated upon the payment of 10 s. if the 10 s. had been paid within four daies, as it might have been, and before the Releases made the party by the intent of the Award had not been bound to have made the Releases, because that by it with, in the time before the Releases made, the Arbitrement shall be defeated by the Condition if it had been a good Award, and therefore it shall not be said to be a small Award at the time of the Award made, because that instantly upon it, before the four daies are passed, there was power in the said parties to have defeated the Award upon the payment of the said 10 s. and therefore it seems to himself also that the Award was void, and by consequence the Plaintiff shall be barred.

6 King Richard the 3. by his Letters Patents granted to the Burgeses of Gloucester and to their Successors, that the Town of Gloucester, &c. shall be a County of it self, several and distinct from the County of Gloucester for ever, and no part of that County, and shall be called the County of the Town of Gloucester; nevertheless saving and reserving to himself and his Heirs, that the Justices of Assise in the County of Gloucester, the Justices of Goal-delivery, and of the Peace, in holding of their Sessions, and also the Sheriff of the County of Gloucester in holding of his County Courts, and every of them may freely enter into the said Town, and keep the said Sessions and County Courts, of, and for any thing and matter arising out of the said County of the Town aforesaid, and within the said County of Gloucester, as before time they had accustomed to hold them there, the said Grant or any other thing notwithstanding. And grants further, that they shall have a

Mayor, two Sheriffs, and one Recorder, within the same County of the Town of Gloucester, and that the Ministers of the Sheriff of the County shall not afterwards enter to do or execute any thing there which to their Office of Sheriff appertaineth, or any waies to intermeddle with it, except only for the Sheriff of the County of Gloucester, to hold their County Courts as is aforesaid: And that the Mayor & Aldermen of the said Town for the time being, & their Successors, having power and authority to enquire here & determine all things which Justices of P. or Justices assigned, to hear & determine Trespasses and Misdemeanors within the County of Gloucester before this time have made or exercised: And that the Justices of Peace, of him, his Heirs, or Successors within the said County of Gloucester, should not intermeddle with the things or causes which belong to the Justices of Peace within the said Town, &c. And upon this Charter divers things were moved by Sir William Periam Knight, now chief Baron of the Exchequer; before his going into the Circuit.

I. Whether, by the saving of the Charter they have sufficient power reserved to them to sit within the Town, being now exempted from the said Town of Gloucester, to enquire there of the Felonies done in the said County of Gloucester; And so for the Assises and Nisi prius taken there of things made in the County of Gloucester. Then if the the Sheriffs may execute their Warrants made there at the time of the Assises or Goal-delivery, notwithstanding the exemption given to them by the Patent.

And it was agreed by all the Justices that the saving in the Patent is sufficient for the Justices of Assise and Goal-delivery to sit there for the things which happen within the County of Gloucester, for as the King may by his Letters Patents make a County, and exempt this from any other County, so may he in the making of it save and except to him and his Successors such part of the Jurisdiction or privilege which the other County from which it is exempted, had in it before; As in divers places of the Realm, the Goal of a Town which is a County of it self, or which is a place privileged from the County, is the Goal of the County, and the place where the Assises or Goal-delivery is holden, is within the County of the Town, and yet serve also for the County at large; as in the Sessions Hall at Newgate, which serves as well for the County of Middlesex as for London, and yet it stands in London, but by usage it hath alwaies been so, and nothing can be well prescribed unto by usage which cannot have a lawfull beginning by Award or Grant, and this by the division of London from Middlesex at the beginning might be so. And so the Goal of Bury, &c. And although that the words are, saving to him and his Heirs, yet by the word (Heirs) it shall be taken for a perpetual saving, which shall go to his Successors, which is the Queen, and the rather because it is a saving for Justice to be done to the Subjects, which shall be taken as largely as it can be: And albeit the expresse saving for the Sheriff is but for to hold his turn, yet in as much as the authority of the Justices of Assise and Goal-delivery in holding their Sessions as before was accustomed is saved, it is Included in it, that all which appertain to the execution of this Service, is also saved, or otherwise the saving shall be to little purpose: And therefore that the Sheriff, or other Minister made by the authority of these Courts, is well made there and warranted by the Charter: And we ought the rather to make such exposition of the Charter, because it hath been alwaies after the Charter so put in execution by all the Justices of Assise: But it seems that by this Commission for the County a thing which happens in the Town cannot be determined, albeit it be felony committed in the Hall during the Sessions, but by a Commission for the Towne it may.

Vide this case
reported in
Coke, lib. 7. 12,
13.

Sir Francis Englefield knight, being seised in his Demesne as of Fee, of the Mannor of Englefield, in the County of Berks, and of divers other Lands, in the first year of Queen Eliz. departed out of the Realm by licence of the Queen for a time, and remained out of the Realm in the parts beyond the Seas above the time of his licence, wherby the Queen by her Warrant under her privy Seal required him to return, upon which he was warned, but did not come, wherupon the Queen seised his Land for his contempt; After which the Statute of Fugitives was made 13. year of the Queen, upon which by Commissions found upon this Statute, all his Lands were newly seised, and after wards 17 Eliz. by Indenture made between him and Francis Englefield his Nephew, and sealed by the said Sir Francis at Rome, the said Sir Francis covenanted with his said Nephew, upon consideration of advancement of his Nephew, and other good considerations to raise an use, that he and his Heirs and all others seised of the said Mannor, &c. shall hereafter stand seised of them to the use of himself for term of his life, without impeachment of Waste, and afterwards to the use of his Nephew, and of the Heirs Males of his body, and for default of such Issue, to the use of the right Heirs and Assigns of the said Francis the Nephew for ever, with a Proviso, that if the said Sir Francis shall have any Issue Male of his body, that then all the said Uses and Limitations shall be void: and with a Proviso further, that if the said Sir Francis by himself or any other, shall at any time during his life, deliver or send to his said Nephew a Ring of Gold, to the intent to make the said Uses and Limitations void, that then the said Uses and Limitations shall be void, and that thereafter the said Mannors, &c. shall be as before. After wards the said Francis was attainted of Treason supposed to be committed by him, 18 Eliz. A Litteres in partibus transmarinis, &c. attainted him prisoner, delinquent, &c. per act de Par. 28 Eliz. by which the forfeiture of the Condition was given to the Queen, and at the same Parliament it was also enacted, that all and every person or persons which had, or claimed to have any Estate of Inheritance, Lease, or Rent then not entered of Record, or certified into the Court of Exchequer, or, in, to, or out of any Mannor, Lands, &c. by or under any Grant, Assurance, or Conveyance whatsoever, had or made at any time after the beginning of the Reign of her Majesty, by any persons attainted of any Treasons mentioned in the said Act after the 8. day of February, 18 Eliz. within two years next ensuing the last day of the Session of the said Parliament, shall openly shew in the said Court of Exchequer, or cause to be openly shew there the same, his, or their Grant, Conveyance, or Assurance, and there in the Term time in open Court, the same shall offer and exhibit, or upon his or their Oath affirming that they have not the same, nor can come by it, or that it was never put in writing, upon the effect thereof to be entered and enrolled of Record, or else every such conveyance and assurance should be void and of none effect, to all intents and purposes; saving to every person and persons (other then to parties and privies to such conveyance & such as shall not exhibit the said conveyance according to the true meaning of this Act) all such Rights, &c. wherupon the said Francis the Nephew, the 20. day of Novem. 30 Eliz. in his own person affirmed upon his Oath that he had not the said conveyance, nor knew not how to come by it, but delivered the effect of the assurance, omitting the time when it was made, otherwise then that it was made after the beginning of the Queens Reign, and before the Treason committed by the said Sir Francis, and before the Statute made 13 Eliz. against Fugitives, and omitting also the last clause of the Condition for the tender of the said Ring; and this he offered openly in the Court of Exchequer the same day: after which the Queen being moved with the said Condition, made a Warrant per Letters Patens under the great Seal, dated 17. Martii 31 Eliz. to Richard Broughton

and Henry Bouchier Esquires, for her and in her place and stead, to deliver or tender to the said Francis the Nephew a Ring of Gold, to the intent to make void the Wiles and limitations limited by the said Indenture, and to return their proceedings upon it into the Court of Exchequer, whereupon they made a tender of a Ring of Gold to the said Francis the Nephew, the 18. day of March, 31 Eliz. which he refused to receive; And the two years after the said Session of Parliament was the 23. day of March, 31 Eliz. And the said Broughton and Bouchier returned all this that they had done as before, with the Commissions into the Exchequer, according to the Commission: And upon this at the Parliament holden 35 Eliz. upon an Act which then was to passe touching the Land and Attainder of the said Sir Francis, diverse questions were moved amongst all the Judges and Barons then there; whereof

1. The first was, whether the effect of the Assurance made by Sir Francis was delivered into the Exchequer according to the intent of the Act, because it wanted the time when it was made, and also one of the Proviso's: And upon good deliberation they all did agree that it was not put in according to the purport of the said Act, for the time may be materiall to be known, for the fraud which by the same Statute might be averred to be in the making of this Conveyance, and for the better tryall of the validity of the assurance and of the cause of it, therefore the true effect thereof ought to be delivered or shewn in writing to be entred of Record, because the Queens Council may see and understand by it whether the Queen might have Title to it, or not; and how can this be if it doth not appear when it was done: And for the Condition how can the Queen by presumption come to the notice of it, if it be not shewn to her: And this was one principall matter of the effect of the said assurance which ought to have been shewn, for this shewing ought to be for the benefit and advantage of the Queen, and not so much for the advantage of the party. And here the effect of it which shall shew for the Queen is omitted, and therefore not shewn in writing according to the purport and intent of the Statute, which was, that by it the Queen and her Council may see what will make for her in the Grant, Conveyance, or Assurance.

2. Whether this Condition were given to the Queen, because that the words in this Indenture precedent to the Condition, are these; viz. Because that the said Francis the Nephew might happen to be of evill behaviour and government, the said Sir Francis provided as before, which (as was alleged) was founded upon a particular regard and respect, which was proper to himself, and therefore cannot be transferred to the Queen; and it doth not appear that he yet had been of ill behaviour: But this notwithstanding, all agreed that this Condition is in the Queen by the attainder of the said Sir Francis, as well by the Act of his Attainder, as by the Act of 33 H.8. which give the forfeiture of Conditions also expressly in the case of Treason.

3. Whether there ought to be an Office for finding the performance of the Condition according to the Warrant, and all agreed that there need not, because that when any man is to do a thing by Warrant of Letters Patents for the Queen, to be returned in any Court, it sufficeth for him to return it, which he hath done according to the Letters Patents, with the Warrant itself, and then that which is so returned, is as well of Record as if it were found by Office and returned of Record; and so it was agreed in the Exchequer, about 16 Eliz. in the case of Edward Dacres, who had made an Assignment of his Goods and Chattels to Sir Alexander Culpepper and others, who afterwards was attainted of Treason by Act of Parliament, and the Condition adjudged to be forfeited to the Queen by the Statute of 33 H.8. and a Warrant was made by Letters Patents to Sir Thomas George to perform the Condition, who did it, and returned that he had done it accordingly, whereby the assurance to the said Sir Alexander and his Companions was avoided, and all the Goods and Chattels of the said Edward forfeited to the

the Queen, and all this was in the Queen without Office found, for that which the Sheriff or other Minister doth by virtue of any Writ or Warrant which is to be of Record, when it is returned of Record, it is as well of Record as the Writ or Warrant it self, so here, &c.

4. But the greatest question was (which was not any thing in the case here) whether the Estate made to Francis the Nephew were void, eo instanti upon Hillary Term finished 31 Eliz. although the two year after the Session of Parliament, 28 Eliz. did not end untill the 28. day of March, 31 Eliz. in as much as no Term was or could be within two years after it, in which the assurance or the effect of it might be shewn openly in the Court of Exchequer, or that it shall tarry to be void untill the two years are fully expired; as if a man make assurance of his Land upon condition, that if he do not go to Rome within two years next ensuing, that it shall be to the use of I.S. and his Heirs, and he stay untill a week within the end of the two years, in so much as it is not possible to perform it within the two years, yet the use doth not change untill the two years are past; but in this case it ought to be shewn a Term within the two years, which is as much as to say, that if the Terms be all past, so as it cannot be done after it within the two years, the Assurance eo instanti upon the finishing of the last Term is become void; as if an Assurance be upon condition, that if in the Term time, within two years he do not levy a fine to I.S. and his Heirs, &c. now if the last Term passe without the fine, the Use change, albeit the two years be not expired; si Parolls fort Plea: And there is great diversity where an Estate is to be defeated, or an Use is to be raised upon an Act to be done, or not done, within a time certain, within two years, and where within two years generally, for in the first case the Use change upon the Act done, or not done immediatly, and in the other not untill the two years are finished, because that by presumption alwaies within two years the Act may be done for any thing of which the Law takes consuance. But if the Act to be done, or not done, refer to any time certain within the two years, as if he do not pay 10l. to one before the Feast of S. Michael the Archangel within the two years, that then the Use shall change, or the Estate shall be void, in these cases immediatly upon the last Feast of S. Michael the Archangel, within the two years the Use change, or the Estate shall be void, as the case is, and shall not tarry untill the full end of the two years to do it, for in the words themselves the diversity appeareth.

8. **A**t the same time there was another Indenture shewn to the said Judges, bearing date the 4. day of May, 1 Eliz. made between the said Sir Francis Englefield of the one part: And Sir Edward Fitton, and Sir Ralph Egerton Knights, of the other part, and inrolled in the Exchequer, according to the Statute of the 30. day of October, 30 Eliz. by which the said Francis for him and his Heirs covenanted with them, that as well in consideration of a Marriage had and solemnised between John Englefield, brother of the said Sir Francis, and Margaret Fitton, Sister to the said Sir Edward, and for the augmentation and interest of the Joynture of the said Margaret, as for other good causes and reasonable considerations, the said Sir Francis especially moving, the said Sir Francis before the Feast of S. John Baptist, then next ensuing, would assure Lands within the County of Warwick, of the value of 60 l. a year to the said Sir Edward and Sir Ralph, and their Heirs, to the use of the said Margaret for her life, and for her Joynture, for part of it, and for the remainder that it shall also be to the use of the said Margaret for her life, in case that the Lady Anne then the wife of the said Sir Francis. should recover her Dower of the said 60 l. a year.

And the said Sir Francis for him and his Heirs, did further covenant with the said Sir Edward and Sir Ralph, that if it should happen that the said Sir Francis

Francis shall die without Issue Male of his body, the said John or any Issue of his body upon the body of the said Margaret begotten then living; that then after the death of the said Sir Francis, as well the Mannors of Englefield, as all his other Mannors (making especial mention of them) should be and might descend, remain, revert, continue or be in possession or reversion unto the said John Englefield, and to the Heirs Males of his body upon the body of the said Margaret lawfully begotten, if the said John were then living; or to the Heirs Males of the body of the said John upon the body of the said Margaret lawfully begotten, without any Act or Acts, Thing or Things made, or to be made by the said Sir Francis to the contrary therof.

And upon this, it was moved, that there was a variance between this Deed now shewn, and this Inrolment; and that therefore it both not appear, whether this Deed was shewn in the Court or delivered there according to the Statute therof made, 28 Eliz. for in the Deed it is (for other good causes) and this word (good) is not comprised within the Inrolment. But as to it, all the Judges and Barons agreed, that albeit these defeats hapned by the negligences of the Clerk in writing and examining, this Inrolment remaines good; in as much as the omissions are in matters and words which are of abundance, and not in that which is any substance of the Deed.

But the Lords of Parliament which were Committees of this case in the Parliament, sent for the Record of the said Inrolment, and would have had this to have been amended in the Chamber next to the Parliament; but as the Officer was in doing of it, the Judges advised that it should not be done, as well because this was not the place where it ought to be amended, but the Court of Exchequer if it were, or needed to be amended: And also because that the two years after the Session of Parliament of 28 Eliz. was then past.

Then it was moved whether by the Covenant and considerations aforesaid, the use shall passe or were raised to John Englefield, or now to his Son Francis, Nephew to the said Sir Francis, and begotten upon the body of the said Margaret. And all agreed that it is not for divers reasons.

1. Because it is, that if it happen that Sir Francis die without Issue Male, that then it shall be to John as before; if he be then living, or to the Heirs Males of his body as before, which is in the disjunctive, to wit, that it shall remain to John, or to his Heirs Male of his body, which cannot raise any use, but found only in Covenant for the incertainty, and also it is upon a future contingent, to wit, if the said John be then living.

2. Because the Covenant is, that it shall come or descend, &c. in the disjunctive, and if he had covenanted that it shall descend to John after his death without Issue Male, it had been cleer that no use had been raised by it, for it shall be but a meer Covenant, to wit, that he shall leave it to descend to him; and here it being in the disjunctive it cannot be any other then a bare Covenant, to wit, that he shall suffer it to descend, or otherwise by conveyance to come to John, after his death without Issue Male, the one, or the other at his pleasure.

And yet further, that it shall descend, come, or remain to John in possession or reversion, so that he may make the one or the other void at his pleasure, which cannot be, if an Use shall be raised by it, and therefore also it enures but as a bare Covenant, which he may perform either the one or the other way at his pleasure.

Also it is, that it shall so descend or come to John without any act or thing done or to be done by him to the contrary, wherby also it fully appeareth, that the assurance of the said John shall stand for all this Land upon the Covenant, and not upon any Use which was to be altered or changed by it.

But if an Use may change by the Disposition of the consideration, yet it shall not change to the said John or his Heirs, until the death of the said Sir Francis without Issue Male, because that until that happen, if the said John had been living, he had not had any Use, because it is that he shall have the Land then if he be then living, and if it shall not be in him until that time, it shall not be in his Heirs until Sir Francis be dead without Issue, for this is the said John or any Issue Male of his body, and he then living, then it shall descend, come, or remain, &c. so that it both not come to the said John or any Issue Male of his body upon the body of the said Margaret, by inheritance nature, when Sir Francis shall be dead without Issue Male, and therefore it yet remains upon a contingency, whether the Use shall be to the Heirs Males of the body of the said John, if it shall be said that it is an Use, and therefore in the mean time the estate of fee simple remains to Sir Francis, but not changed, but for the Estate tail it is in himself, if any change shall be, it appears to be before that it shall not be, and therefore by the attainder of the said Sir Francis, the whole fee simple is now all forfeited to the Queen, before that the Use may be to the Heirs Males of the body of the said John. And the Queen shall not come to this Land then by priority by the said Sir Francis, but in the Post by the Heirs, and therefore the possession of the Queen now, or of her Patentee shall never be charged with this Use, which shall never be carried out of any other possession but such which remaineth in priority until the Use is to come in, and no more now than as it might at common Law before the Statute of Uses, 27 H. 8. And this as to the future Use was the opinion of Popham, and some others of the Justices. And note 21 H. 7. p. 30. A man covenant in consideration of the Marriage of his son, that immediately after his death his Land shall revert, remain, or descend to his son, to him and the Heirs of his body, or to him and his Heirs for ever, that this is but a bare Covenant, and does not change any Use. And what liberty there is therein the case of Sir Francis Englefield, who covenanted that it should descend or remain in possession, or revert. And as it seems the great difficulty which was in the case of Sir Robert Constable, which was put by Gerard Attorney general, & Eliz. and it appeareth in Dyer 1. Mar. was because that the Covenant was, that it should be to the son in possession or use, which for the uncertainty in as much as it was in them to leave the one or the other, or perhaps the Estate of their Land was such, that part was in possession and part in use, and therefore according to the intent taken rather for a Covenant than for matter sufficient to change the use. But it was so that it was never helped by any right which he had, but by the grace of the Queen he enjoyed it.

Easter Term, 35 Eliz.

Crocker and York, versus Dormer.

Upon a Recovery had by John Crocker and George York, against Geoffrey Dormer, in a Writ of Entry in the Post, of the Manor of Farningho, with the Appurtenances, and of 6 Messuages, 6 Cottages, &c. in Farningho, and of a yearly Rent or pension of 4 Marks issuing out of the Church or Rectory of Farningho, and of the Advowson of the Church of Farningho, in the County of Northampton, William Dormer Son and Heir of the said Geoffrey, brought a Writ of Error, and assigned divers Errors.

1. Because that such a form of Writ doth not lie of an Advowson, but only a Right of Advowson, Darrein presentment and Quare impedit.

2. Because he demands the Advowson of the Rectory, and also a Rent issuing out of the same Rectory.

3. Be-

3. Because the Demand for the Rent is in the Disjunctive, to wit, a Rent or a Pension.

4. Because it is a pension, whereas a Pension is not sitable in our Law, but in the Spiritual Court. To which Gaudy said, that there is a great diversity between a common Recovery, which is an assurance between parties and a Recovery which is upon Title, for a common Recovery is to an Use, to wit, to the use of him against whom it is had. If no other use can be averred, and therefore as to the Use, it is to be guided according to the intent of the parties, and by a common Recovery had against Tenant for life, he in the Reversion if he be not party or privy to it, may enter for a fee simple, as it was adjudged very lately in the Exchequer, by the advice of all the Justices in the case of a Recovery had against Sir William Pecham Knight, and in all these things it is otherwise in case of a Recovery upon Title, and therefore in as much as this common Recovery is but a common Assurance between parties, and is always by assent between parties, so the end that they may make assurance from one to another, there shall be and always hath been a contrary exposition to a Recovery which is by pretence of Title, and it hath been common to put in such Recoveries, Abbotships, Commons, Warrens, and the like, and yet always allowed: And if this shall be now drawn in question, infinite Assurances shall by this be endangered, which the Law will not suffer, and therefore the Demand of an Abbotship and Pension in the writ of Entry makes not the writ vicious, as it shall be in another writ of Entry founded upon a Title and not upon an Assurance. And as to that, that the Rent and the Abbotship also is demanded, this is good, because the Abbotship is another thing than the Recovery it self, out of which the Rent is demanded to be issuing: And for the disjunctive Demand of the Rent or Pension, it makes no matter in this case, because it is a common Recovery in which such a precise form is not necessary to be used as in other writs, and also a Pension issuing out of a Recovery is the same with the rent: To which Clench and Fennor agreed in all; but Popham moved that the greatest difficulty in this case is the Demand made to the disjunctive, to wit, of the annual Rent or Pension, for if a Pension issuing out of a Recovery shall be said to be a thing merely spiritual, and not to be demanded by our Law, or merely of another nature than the Rent it self, with which it is conjoined by the word (or) then it is erroneous; for albeit a common Recovery be now a common assurance of Land past by the assent of parties, and therefore hath another conversation, than that which passeth by pretence of Title, yet we are not to omit grosse absurdities in such common Recoveries, as to demand an acre of Land or Wood in the Warrant of Sale, or Dale, or black acre, or white acre, these are not good in common Recoveries, because there is no certainty in the Demand which of them the party is to recover, which kind of absurdity is not to be admitted in these Recoveries; for this is but a meer ignorance in the Law and the Ministers of it. And to this Gaudy and the other Justices agreed, but they sayd, that a Pension issuing and a Rent shall be taken for all one; for if a man grant a Pension of 20 s. a year, issuing out of the Warrant of D. or of the Rectory of S these are Rents issuing out of them: and if the Demand had been of an annual Rent, or Annuity of 20 s. a year issuing out of the Rectory, this had been good. To which Popham agreed, and yet sayd, if it had been an annual Rent of 20 s. &c. or of an Annuity of 20 s. it had not been good, because that the word (issuing) is not referred to the Annuity, but to the Rent only, and therefore are merely general, and not as the same, but if the Demand were of an annuity, rent, or payment of 20 s. issuing out of a Rectory, it is good, for this is but one and the same. When it was alledged that notwithstanding that which appears to the Court, it cannot be taken that this was a common Recovery, for upon the assignment of the Error, it is not averred that it was a common Recovery

very, to which Popham said, that common Recoveries are such common Assurances to all persons that are well known to all, and especially to us that they need not be averred, for they are known by certain Writs, to wit, by the voluntary entry into the Writ, the common Voucher and the like: And at last they all agreed that the Judgment shall be affirmed.

2. In Writ, by Thomas Haydock against Richard Warnford, the case was this; One Michael Dennis was seised in his Demesne as of Fee, of the third part of a Messuage, and of certain Lands in Bury Blunden in the County of Wilt, and being so seised the last of April, 9 Eliz. demised them to Susan Warnford for 41. years, from the feast of S. Michael the Archangel then next ensuing, who assigned this over to Richard Warnford, after which the said Michael Dennis by bargain and sale enrolled, according to the Statute conveyed the Reversion to John Simborn Esquire, and his Heirs, the said John being then seised of another third part thereof in his Demesne as of Fee, after which, to wit, the first day of June, 17 Eliz. the said John Simborn demised the said third part, which was his before his said purchase to the said Richard Warnford for 21 years then next ensuing, and afterwards the said John Simborn died seised of the Reversion of the said two parts, and this descended to Barnaby Simborn his Son and next Heir, who the 20 of June, 28 Eliz. by bargain and sale enrolled, according to the Statute conveyed, he Reversion of the said two parts to the said Thomas Haydock and his Heirs, after which the said Richard Warnford committed Writ in the said house, whereupon the said Thomas Haydock brought an action of Writ against him, according to the said two severall Leases, and assigned the Writ in suffering the Wall of the price of 20 l. a Kitchen of the price of 20 l. and so of other things to be uncovered, whereby the great Timber of them became rotten, and so became ruinous, to the disinheritance of the Plaintiff, and upon a Nihil dicit, a Writ was awarded to enquire of Damages, in which it was comprised that the Sheriff shall go to the place wasted, and there enquire of the said Damages, who returned an inquisition taken thereof at Bury Blunden, without making mention that he went to the place wasted, and that it was taken there, whereupon Judgment was given in the common Bench, that the said Plaintiff shall recover his Heirs against the Defendant of the said places wasted, with their Appurtenances Per visum Jurator. Inquisitionis predict. & damna sua occasione vasti in eisdem locis in triplo secundum formam statuti, &c. And upon this a Writ of Error was brought in the Kings Bench, and there by all the Justices it was agreed that it was but Surplusage to comprehend in the Writ of enquiry of Damages, that the Sheriff shall go to the place wasted, and there enquire of the Damages, in as much as by the not denying thereof, the Writ is acknowledged, and therefore he need not go to the place wasted: But where a Writ is awarded to enquire of the Writ upon default made at the grand Distress, there by the Statute of West. 2. cap. 24. the Sheriff ought to go in person to the place Wasted, and enquire of the Writ done, and therefore in that case it is needfull to have the clause in it, that the Sheriff shall go to the place wasted, and there enquire of it: for by the view the Writ may be the better known to them, but where the Writ is acknowledged, as here, that clause need not, and albeit it be comprehended in the Writ, yet the Sheriff is not thereby bound to go to the place wasted, and to enquire there, but he may do it at any place within his Bayliwick where he will, and therefore it is no error in this point: And they agreed also that the Writ is well assigned in the entire Wall, &c. although the Action were brought but upon the Demises of two third parts of it, and it cannot be done in these parts, but that it is done in the whole, and also it cannot be done in the whole, but that it is also done in the three parts, but yet the doing thereof is not to the disinheritance of the Plaintiff, but in these two third parts; and therefore no error in this manner of assigning of the

the Wast. And they also agreed that the Action is well brought upon these severall Demises, because neither the interest of the Term, nor of the Inheritance was severed nor divided to severall persons at the time of the doing of the Wast, but the two Terms in the one, to wit, in Warnford, and the Inheritance of these immediately in the other, to wit, in Haydock; And by Popham also, the thing in which the Wast is assigned, is one and the same thing and not diverse, to wit, a Messuage, and therfore by Brudnell and Pollard, 14 H.8. 10. if severall Demises are made of one and the same Messuage by one and the same person, as one part at one time, and another part at another, an Action of Wast may well lye: Albeit Fitzherbert and Brook seem therein to be of a contrary opinion, and that severall Actions of Wast ought to be in that case.

And the exception was taken, because the Judgment was entred that he shall recover the place wasted, Per visum Jurator. prædict. whereas they had not the view of it in this case, for this should be where it is given upon a Writ awarded to enquire of the Wast upon default made at the grand Discreesse; whereas here the Wast is not denied but acknowledged.

But as to this, severall Presidents were shewn, the one upon Demurrer for part, Hill. 1. Maria. Rot. 301. and another Tr. 31. H.8. Rot. 142. in an Information, in both which Cases the Judgment was entred as here, to wit, Per visum Jur. prædict. and yet in these, the Wast was as acknowledged: Whereupon it was ordered that the Judgment should be affirmed.

3. In an Ejectione firmæ brought by Sir Moyle Finch Knight, Plaintiff against John Risley Defendant, for a Messuage and a Mill in Raveston in the County of Buckinghamshire, the case for the matter in Law appeared mostly to be this.

The King and Queen Philip and Mary by their Letters Patents, dated the eight of July, 3. & 4. of their Reign, made a Lease of the Reversion of the Mannor of Raveston (of which this was parcell) to Sir Robert Throgmorton for seventy years, from such a Feast, after the death of the Countesse of Ormond, who then had it for her life, rendering yearly 73 l. 13 s. payable at the Feasts of Saint Michael the Arch-angel, and the Annunciation of our Lady, at the receipt of the Exchequer by equall portions, with a Proviso that the Lease shall cease, if the said Rent or any part thereof were arrear, and not paid at the said Feast, or a certain time after, the Reversion descend to the now Queen, and the said Countesse died 7 Eliz. part of the Rent then payable, was not paid at the day, nor within the time limited by the Proviso, afterwards Queen Elizabeth by her Letters Patents, dated 30. May, 30 Eliz. granted the said Mannor to the said Sir Moyle, and one Awdeley and their Heirs in Fee, with a clause in it, that the Letters Patents shall be good, notwithstanding there be not any recital of any Leases or Grants at any time before that made by her, or any of her Progenitors; after which an Office is found for the Queen, that the Rent was arrear and not paid as before, after which the said Sir Moyle and Awdeley assured the said Mannors by bargain and sale to Sir Thomas Hennage who demised the said Messuage and Mill to the said Sir Moyle, upon whom the said Risley entred in right of the said Lease made by the said King Phillip and Queen Mary, under Thomas Throgmorton, who then pretended to have the term of the said Lease from Sir Robert his Father. The case was well argued at the Bar, and now at the Bench, where Fennor moved first, Whether it were a Condition. 2. Whether an Office were requisite. 3. Whether this Office found, comes soon enough for time: For the first he conceived that it was a conditional Limitation, for a Limitation is that which limits an Estate certain or doubtfull, as Quandiu in manibus nostris fore contigerit, quamdiu amicus sit, or dummodo solverit: And there (dummodo)

was a Condition as appeareth, 5 Ass. plir. 9. & 2. Ass. a Grant made to J.S. and his Heirs tam diu, as the Granto, and his Heir shall enjoy such a Part, no, this is a Limitation, and a Limitation alwaies determines the Estate, but a Condition albeit it be broken during the Estate, yet it doth not determine the Estate, and so it is of a conditional Limitation, and therefore tis not in the King untill an Office be therof found, for the King submits himself to the Law, for Bracton saith, Quod non debet judicare sed secundum legem, and his Prerogative is so excellent, that he cannot take a part with any thing, but by matter of Record, neither can he draw the Right of Possession of any one in question upon a bare surmise, but by Office or other matter of Record, for a Record alwaies carries credit with it. And there is no diversity where two matters are limited in Deed, and where one is limited in a Deed, and the other by the Law: And the contrary objections are easily answered, for when the Tenant in tail of the King dies without Issue, it is in the King without Office, because the Law does not help them which condemn it. But in case of an Office which is forfeited, it is in the King to dispose without Office, because the King is not to have the Office it self but the disposition of it, and yet it is to be defeated by Scire facias in the Chancery.

If a Will be demised for life, upon condition that he shall not let it but to a Milner, and he breaks the Condition, in case of the King there must be an Office to avoid it, and there the Office entitles the King to the Condition and not to the Entry, for after the Office it is not in the King untill Entry: And here the Rent may be paid to the Kings Bayly in the Country, which is matter in fact, and therefore shall not be defeated without Office; And here the Office comes too late to give any advantage to the Patentee, for the King cannot grant a Title of Entry before Office, no more then the Assignee of a common person can take advantage of a Condition broken in the time of the Granto, of which the Granto did not take advantage in his time; And if the Queen makes a Lease durante beneplacito, the Patentee shall not avoid it, as it appears in the Lord Burgleighs case, and therefore the Office here shall not help the Patentee, but the Queen for the mean profits: for although nullum tempus occurrit Regi, yet the Patentee shall not take advantage of this Prerogative.

Clench agreed cleerly, that it was a Limitation, but yet that it is at the Queens liberty to avoid or make it good, for perhaps the Rent is better then the value of the Land, and upon this reason a Lease from the King Provis hominibus de dale, or to a Monk rendring rent, is good, which otherwise had been meerly void: And by the Office found, the Election of the Queen appeareth, without which the Lease is to continue, and therefore the Patentee shall not defeat that which happened in the Queens time before.

Popham, to say that the Office helps the Queen for the mean Profits, and that now the Patentee shall not take advantage to avoid the Lease is too absurd; for the Queen cannot take advantage to have the mean Profits, but in respect of the avoidance of the Lease: And if the Lease were made void or determined against the Queen, it shall not remain good and of force against the Patentee; and also to say, that the Lease might have its continuance, after that it is determined by the Limitation comprehended in the Writing, by reason of a reservation, is also too absurd, for so it may be said, that if the Queen make a Lease for years, if J.S. shall live so long, rendring rent, that this Lease may have continuance after the death of J.S. which cleerly is not Law; And the Patentee here shall take the advantage to avoid the Lease hapned before his Patent made, because that no Office need to be found of the not payment before it passed from the Queen to make it void, and the reason is, because this Proviso (as it is penned) is a meer Limitation of the Estate, and not any manner of Condition; And therefore if the Queen
makes

make a Lease for 100. years, if the Lessee shall so long lawfully pay the Rent reserved at the day of payment, if he fail of payment of the Rent reserved at the day limited, the Lease is ipso facto determined, and it need not be found by Office. And what diversity is there where the Limitation is conjoyned to the estate it self, and where it cometh in by a Proviso afterwards, all being in one and the same Deed, and therefore spoken at one and the same time, for the one and the other case manifesteth that the contract and agreement is, that the Lease shall not continue longer then the default of the payment of the Rent.

And in this case, suppose that the Queen had granted over the Land: shall not the Patentee have advantage to avoid the Lease, because that no Office was found before? It is cleer that he shall, or otherwise this is now become to be an absolute Lease for a hundred years, which is not Law, for it is meerly contrary to the Contract, and therefore absurd to be maintained: I agree with the generall rule that nothing shall passe to, or from the Queen but by matter of Record; but this makes nothing against me in this case, for here the same Record which passeth the Estate to the party, to wit, the Patent of the Lease contains the time how long it shall endure, longer then which it cannot continue: And therefore by 9 H. 7. If the King makes a Gift in tail, and the Donee dies without Issue, the Land is in the King without Office, so in every other case where the Estate is determined according to the limitation, for he cannot be put out of possession wrongfully, and now hath right to hold it against him. And I say that no warrant or authority can be found throughout the whole Law where a Lease or Estate made by the King is determined by an expresse limitation comprised in the Patent it self of the Grant, that there need not any Office or other thing to determine it, for that which is comprised in the same Patent may determine it, of it self.

And further, whereas the Proviso is, that the re-entry shall be for default of payment of the Rent, and the like, there the Term continues untill the re-entry be made, notwithstanding the Condition be broken, as appeareth by all the Justices, 28 H. 8. because it is expressely limited that it shall be defeated by the re-entry, & there before re-entry be made, the Action of Waste shall be, quod tenet: And by 12 H. 7. where a common person is put to his Entry, there the Queen is put to an Office, with which agrees Stamford in his Book of Prerogative: But in this case, if it were between common persons, the Lease shall be determined upon default of payment of the Rent, and before any re-entry, and therefore in the Queens case it shall be determined without Office. But if the case had been, that if the Rent had been arrear and not paid, that then upon re-entry made, it ought to cease, there an Office had been necessary to counterbail the Entry in case of the Queen, or otherwise the Lease shall not cease, because the Queen cannot make an Entry but by such means, and therefore it ought to be by matter comprised in the Patent. It hath been said, that this shall be a conditionall Limitation, and that therefore an Office is necessary; but I say, that here is not any matter or quality of a Condition, but meerly of a Limitation, and tis rather a contingent Limitation then any manner of Condition, and this is well proued by 11 H. 7. which is, that the Grantee of a Reversion shall take advantage of it at common Law, the which he cannot do if it savour any way of a Condition, and by 27 H. 8. a Proviso in a Deed ought alwaies to be expounded according to the purport, because that it is placed in a Deed, sometimes for a Condition, as where a Proviso is that the Lessee shall not alien; sometimes for an exception, as where a Proviso is, that the Lease shall not extend to such an acre, or such a thing, sometimes for a Limitation, as here and in the like cases. And in this case the release of the Rent shall make it, that the Lease shall never be determined for the not payment of it, because that afterwards there cannot be any such default of payment, and therefore in such a case the Limitation remaineth

maineth absolute and discharged of the contingent, which otherwise had determined it: As if a man make a Lease for a 100. years, if the Lessee in the mean time do not cut such a Tree, a release of all Conditions will not serve, yet if the Lessor himself or any other but the Lessee cut it, the Lease is become absolute for a 100. years: And so upon this point my conceit appeareth. But the most colourable thing which hath been alledged on the other side, was by my Brother Drew, which was, that in counting upon an Ejectione firmæ, and pleading in such a Lease as here, it shall be as an absolute Lease for the years comprised in the Habendum, without making any mention of the Prouiso, upon which he enforced it that it shall be taken to be of more efficacy then if it stood merely upon the Contingent; for he said, that upon a Lease made for years, if the Lessee shall so long live, and the like, in the count, and also in the pleading mention ought to be made of the life of the Lessee: I agree it to be true that the pleading shall be so, for in count counting, and in plea pleading, if the matter of the Contingent precede the Limitation, or be annexed to the Limitation, there a man ought to speak to the Contingent, or otherwise it is not good, as by 14 H. 8. it shall be of a Condition where it is precedent; But in case of a Condition it is quite otherwise, for if a man make a Lease to another for years, Si tamdiu vixerit, or Dummodo solverit, &c. or the like, which are annexed to the limitation of the Estate; in all these cases in counting and also in pleading, he ought to aver the life of the Lessee, or otherwise the contents of the thing according to the limitation: But where that which was the Limitation cometh by a Prouiso, after the Habendum which distinguisheth the sentence as here, there, because it is a matter distinct and subsequent from the Habendum, and not annexed to it, he need not to speak of it, but there it shall alwaies come in to be shewn of the other part, and this is the usuall and common case of difference for pleading, but this makes no difference of the Estate; And therefore if an Obligation be made with a Condition endorsed, the Plaintiff in debt upon it doth not speak of the Condition in his Count, but if the Condition be precedent, or stands comprised within the body of the Obligation, then he ought to speak of it in his Count, as appeareth by 28 H. 8. where a man was bound in twenty quarters of Halt, to be paid at such a day, and if he fail, that he shall pay forty quarters at such a day, if he demand the forty quarters in his count, he ought to shew the default of payment of the twenty quarters at the day limited for it, and yet the Condition that is out of, and that which is comprehended within the Obligation are but as one for the substance, but for the form it differs as to the pleading, which form ought to be observed.

Another reason is in this case, because that the payment of the Rent is limited to be made at the receipt of the Exchequer, in which case if it had been paid, the payment had been entred of Record, and not being so, the default appeareth of Record, and where the default appeareth of Record, there needs no Office, for it shall be in vain to make that to appear upon Record by Office, which otherwise appeareth of it self by Record, and therefore in 4. and 5. of Phil. & Mary it appeareth, where Sir John Savage was Sheriff of the County of W. in Fee, and that he was indicted of two severall voluntary escapes of Felons, and for not keeping of his Turn in loco consueto upon two Indictments removed into the Kings Bench in 8 H. 8. upon the motion of the Attorney generall the Office was seised into the Kings hand without Scire facias, or any Inquisition found thereof, and as appeareth 3 Eliz. One Blake who by Patent was the Kings Remembrancer in the Exchequer being made one of the Barons of the same Exchequer, the other Office was ipso facto gone and determined, & there need no inquisition to be made of it, nor Scire facias to avoid it, because the taking of the Office of a Baron is of Record; And a man cannot be a Judge and a Minister in one and the same Court, and therefore the first Office is determined by taking of the second, and there need

no Office to be found of it, the matter it self being apparant upon Record, and therfore as it appeareth it was adjudged in 13 H.8. that a new Patent of the same Office of Remembrancer making recitall of the former Patent (which appeared as before upon Record to be void) with a clause Quod post mortem sine determinationem, &c. therof, the new Grant shall take effect, was void. And Englefields case was lately adjudged in the Exchequer (and at the Parliament 35 Eliz. allowed to be good Law by all the Justices there being) where the Queen had a Condition given to her by forfeiture upon an Attainder of Treason to be performed by the payment of a sum of money, or the like: If the Queen makes a Warrant by Patent to one to perform the Condition, and to return his proceedings therupon into the Exchequer, who performs it accordingly, and therupon returns all that he hath done with his Warrant into the Exchequer, no Office need to be found of the performance of the Condition, because that by the return (which is warranted by the Patent) the Condition appeareth sufficiently upon Record to be performed, and therfore no Office need to be found, no more of the not-payment in this case. It hath been said by some, that it may be that the Patentee hath tendered the Rent at the receipt, and that they would not receive or record the receipt of it, and that then it should be hard that he should loose his Lease, no default being in him: to which I say, suppose a man be bound to make his appearance in any of the Kings Courts, may he say, that he appeared there according to the Obligation, & excuse himself by such bare averment therof, unlesse his appearance be entred of Record? It is cleer that he cannot, as appeareth by 18 E.4. for appearance in a Court of Record, is not unlesse it be of Record, yet it may be said, that then the case may be had to the party: as if the Officer will not record his appearance, which is the same mischief as in this case, but this will not help him, for first the Law presumes that every Officer will be indifferent betwixt party and party; and upon this opinion had of him he is admitted to his Office, wherupon the Law presumes that if the party would have appeared, that the Officer would have recorded it, and in as much as he did not do it, it shall be taken that he did not appear. But the strongest reason in the case is this, to wit, if default be not in the party to do that which he ought to do, but in the Officer to do that which belongeth to his Office, as to record that which he ought to record, there the Officer shall be chargable to the party in an Action upon the case, to answer him so much in Damages as he hath sustained by such default of the Officer, and the Law will put the party rather to such a recovery then to answer it by a bare matter of averment which ought to be of Record. And further such a voluntary default may be a forfeiture of his Office, and so a sufficient penalty in case of an Officer. And to say, that the Office of Receipt is not an Office of Record, is too absurd, for it is a principall member and part of the Court of Exchequer, and as wel of Record, for the matters belonging to it, as the Offices of the Pipe and Remembrancers are for those things which belong to them, and the Records of Receipt as well inrolled in Rolls of Parchment as any other Records of the Queen in this, or any other Court, & it is commonly used now to convey Reversions & Remainders to the Queen, with a Proviso to be void upon payment of a certain sum of money to the Queen at the receipt of the Exchequer, & it is as usual upon payment made there to have it back again without office found of this payment. and what is the reason of it? now, but because the payment there is alwaies entred upon Record, & therfore no Office needs make this payment to appear upon Record. And for the case of Sir Rob. Chester, 4 Eliz. there is great diversity between that & this case, for it is ordained by the Act that upon the default of payment. (which is not limited there to be made at the receipt) the office shall be forfeited, & not that the estate in the office shall cease. And of a thing forfeited it is at the election of him who is to take advantage of the forfeiture, whether he will take it or not, and till the advantage taken therof the party still remains an Officer.

And therfore if the Queen make a Lease for years, and the Terme makes a Feoffment in Fee, the Term by this is extinct, as was agreed upon an Evidence in the Exchequer 28 El. in the case of Drayton Bassett, and before that, in the same case in the Kings Bench, and yet no reversion is drawn thereby out of the Queen. Suppose then that the Queen before any Office found thereof, grant the Land over in Fee, shall not the Patentee take advantage thereof by extinguishing the Term? It is cleer that he shall, and albeit a Terme holdeth over his Term, yet the Patentee of the Queen, and also the Bargaine of a common person after the Inrolment of the Bargain shall take advantage of this determination of the Term.

And for the not reciting of Throgmortons Lease in the Letters Patents made to Finch and Audeley, it is to no purpose to speak to it, because the Estate was finished before the Grant; And further, because there was a Non obstante in the Patent, that it shall be effectually, notwithstanding any not recital of any Lease being of Record, or not being of Record, mis-recital, &c. which was by all at the Bench admitted to be good, and not contradicted by any.

And for the Office found after the Grant made, I did not speak to it, because it is of no purpose to help the Patentee, but yet shall serve the Queen for the mean profits, as hath been said: See more of this case, Trin. 36 Eliz. pl. 2.

Trinity Term 35 Eliz.

Hughes *versus* Robotham.

I. **M**eredith Hughes brought an Action upon the Case against William Robotham Executor to Ja. Robotham, for that the Plaintiff in the life time of the said Testator, to wit, the 12th. of April, 28 Eliz. at London, in such a Parish and Ward, was possessed of a Messuage, with the Appurtenances, in the same Parish and Ward, for divers years then to come; And whereas also the said Testator was then possessed of the reversion thereof after divers years then also to come, and so possessed the said Testator the said 12th. day of April, at London, in the Parish and Ward aforesaid, in consideration that the Plaintiff at the instance and request of the Testator in his life time would surrender all his Estate and Term of years which he then had to come in the said Messuage, with the Appurtenances, and procure one Thomas Thornell to give to the said Testator a 100. marks for a Lease thereof to be made by the said Testator to the said Thornell, he assumed and promised to pay to the Plaintiff 30 l. of the said 100. marks, when he should be therunto required by the Plaintiff.

And the Plaintiff alledged in fact, that he at the instance and request of the said Testator in his life time afterwards, to wit, the 20th. day of April, 28 Eliz. at London, in the Parish and Ward aforesaid, surrendered to the said Testator all the Estate and term of years which he then had to come in the said Messuage, &c. and that he, the same 20th. day of April, in the same Parish and Ward, procured the said Thornell to give to the said Testator 100. marks for a Lease of the said Messuage, &c. by the Testator to the said Thornell, then and there made for 19 years, from the Feast of the Annunciation of our Lady then last past, and that yet the said Testator in his life time, nor the said Defendant after his death, have not paid to him the said 30 l. albeit the said Testator in his life time, to wit, the 24. day of April aforesaid, at London, in the Parish and Ward aforesaid, as therunto required by the said Plaintiff, and albeit the Defendant after the death of the said Testator, to wit, the 10th. day of April, 32 Eliz. in the Parish and Ward aforesaid, was also

also therunto required by the said Plaintiff: And albeit there were sufficient Goods and Chattels of the said Testator at the time of his death, to pay as well the said 30 l. as all other Debts of the said Testator, and also to discharge the Funerals of the said Testator, which Goods and Chattels came to the said hand of the said Defendant, &c.

And after Non assumpsit pleaded, and a Verdict for the Plaintiff, exceptio[n] was taken in arrest of Judgment, that the Declaration was not good.

1. Because it is, that the Plaintiff the 20th. day of April, 28 Eliz. surrendered all the Estate and term which he had then to come, and this (for any thing shewn) may be another Term then he had the 12th. day before, for it is not said, and so being possessed the 20th. day he surrendered, but generally as before.

And further the consideration was, that he ought to surrender all the Term which he had the 12th. day of April, which cannot be made the 20th. day, for in the mean time, part of the Term is incurred, and therefore the purpose was that the surrender should have been made immediately as soon as might be, so as by the delay thereof the said Robotham should not lose any part of the Term to come.

And it was further alledged, that a term for years cannot be surrendered to another Term, for years.

Gawdy, The consideration is, that the Plaintiff at the request of the Testator in his life time should surrender, so that it is not to be done untill he be required by the Testator, and not instantly at his perill without request precedent; and here it is alledged that the Plaintiff at the request of the said Testator, the 20th. day of April surrendered, which is well done, and according to the agreement, and albeit it had been more formall to have said that the said Plaintiff so being possessed afterwards, to wit, the 20th. day of April, surrendered, &c. yet it shall not be intended that he had any other term then that which he had before, if it be not shewn on the other side in his Bar, and especially here, where the Action is not grounded upon the Term, but upon the Assumpsit, and the consideration is nothing but an inducement to the Assumption, which is not so formall to be made as if the Action had been grounded upon the Term it self. And therefore in an Action upon the case upon an Assumpsit, it sufficeth to say, that whereas the Defendant was indebted to the Plaintiff in divers sums of money amounting in all to a 100 l. the Defendant assumed to pay him the 100 l. at such a day, without saying, how, or in what manner these Debts accrued, or when, because the Action is not merely founded upon the Debt but upon the promise, and the Debts are but inducements to it: But if it were to recover the Debts themselves in an Action of Debt there ought to be made a certainty thereof, to wit, when, and how it comes.

And further here, in as much as the Assumpsit is found for the Plaintiff, it shall be implied that the consideration was duly performed, for without due proof of the consideration the Plaintiff hath failed of his assumption, and therefore also it shall be now taken that the Testator hath such a term of years in reversion, to which the term for years in possession may be surrendered, for he said, that he who hath ten years in possession may well surrender to him who hath more years, as twenty in reversion; for the lesser may surrender to the greater term. To all which Popham and Fennor agreed: And Popham said further, although it shall be taken most strongly against Hughes, to wit, that Robotham had a lesser term in the reversion then Hughes had in the possession, yet the surrender shall be good, for in Law it is greater and more beneficiall for him to have a lesser term to be a term in possession, then to have it to be in reversion: And by him, if a Lessee for twenty years make a Lease for ten years, then he which makes the Lease for ten years hath a reversion upon these ten years, so that if Kent be reserved upon it, he may di-

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Train for it and have Fealty of the Termor: And if he grant the Reversion over for ten years, with attornment of the Termor in possession, the Grantee hath the Reversion and shall have the Rent for the time, and yet the Remainder for years remains alwaies to the Grantor, and therfore before the Reversion granted over, the Termor for ten years in possession might have surrendered to his Lessor, and thereby the said Lessor shall have so many of the said years which were then to come of his former term of twenty years; And after the Reversion granted, he, which hath the ten years may surrender to the Grantee of ten years in Reversion, and there he shall have so many years in possession which were to come of his Reversion, *Quod nota bene*: And if he had had a lesser term in the Reversion then the Lessor himself had in the Possession, it shall go to the benefit of the first Termor for twenty years, who was his Grantor, for the Term in possession is quite gone and drowned in the Reversion to the benefit of those who have the Reversion thereupon, having regard to their Estate in the Reversion, and not otherwise; to all which Fennor agreed, whereupon Gawdy gave the rule that Judgment shall be entered for the Plaintiff: But Popham said, that if the consideration for the surrender had not been sufficiently alledged, that the Plaintiff should not be helped by the other consideration of 100. marks given by Thornell, for if such an Assumption as this is be founded upon two more considerations, and such which by possibility may be performed, then the party hath failed of his Suit: As if a man in consideration of 5 s. paid, and of other 5 s. to be paid at a day to come, assume to do a thing, or to pay money, if the one 5 s. be not paid, or if it be not averred that the other 5 s. was paid at the day limited for the payment of it, the party hath failed in his assumption in the one case, and the declaration is insufficient in the other case, for he hath made a departure from his consideration: But if one of the considerations be impossible, or against Law, there the other considerations which are possible, or stand with the Law suffice if they be well alledged. And he said, that the Executor shall be charged with the contract of the Testator by common course of the Court, which stands upon reason, for if an Action of Debt upon a bare contract be brought against an Executor, if he do not demur upon it but plead to the Pleas, that he owes him nothing, and it is found against him, he shall be thereby charged of the Goods of the dead; and the cause why he may be helped by demurring upon the declaration in that case, is, because the Testator might have waged his Law in that case of debt, which the Executor could not do of other contracts, and therfore shall not be charged with it by such an act, if he will help himself by demurrer; but in the assumption of his Testator, he could not have waged his Law: and it is founded upon the death of the Testator, to wit, his debt, with which the Executor by a mean may be charged as before, and therfore the assumption in such a case maintainable against the Executor. But if the Testator upon good consideration assume to make assurance of Land, or to do any other such collaterall thing which doth not sound in a duty of a thing payable, there the Executor shall never be charged with such an assumption to render recompence for it. And to this agreed all the Justices of the common Bench, and Barons of the Exchequer; And such an assumption hath not been allowed in the Kings Bench but of late time, and that but in one or two cases. But in the other case it hath been common and of long time used, and therfore now too late to be drawn in question; and if it should be, it may be maintained with good reason in this case of a duty of a thing payable, in as much as the Testator cannot wage his Law in the Action, but in the other case there is no reason nor course of the Court to maintain it: But the Judges in the Exchequer Chamber reversed all these Judgments in both cases.

2. Nota, that this Term was adjourned to Octob. Trin. and because the writ was, that Adjournment shall be made in Octob. Trin. of all cases, untill Tres Trinitat. the Adjournment was made in every of the Courts of Kings Bench, Common Bench, and the Exchequer, the very first day of Octob. Trin. then it was holden by the Justices, that the Adjournment ought not to have been made untill the sitting of the Court the fourth day from Octabis.

And because that the writs were, that at the said Tres Tr. the Term shall be holden thereafter, as if no Adjournment had been, the Justices held that they ought to sit the first day of the said Tres Trin. and so from thence every day untill the end of the Term, and for all causes, as if no adjournment had been; and so they did accordingly, saving by assent some of the Justices did not come thither by reason of their far distance from London, at the end of the Term upon the last Adjournment: But they held, that if it had not been for the speciall words in the writ, which were, that it shall be then holden as if no Adjournment had been, the Estates had been the first day of Tres Trin. and the full Term had not been untill the fourth day, which was the last day of the Term, quod nota, and so it was of the Adjournment which happened first at Westminster, and afterwards at Hertford from Michaelmas Term now last past.

Michaelmas Term 35 and 36 Eliz.

Gravenor *versus* Brook and others.

I. **I**n an Ejectione firmæ by Edward Gravenor Plaintiff, against Richard Brook and others Defendants, the case appeared to be this; Henry Hall was seised in his Demesne as of Fee, according to the custom of the Mannor of A. in the County of D. of certain customary Tenements holden of the said Mannor called Fairchildes and Preachers, &c. In the third year of Henry the 8th. (before which time the customary Tenements of the said Mannor had alwaies been used to be granted by Copy of Court Roll of the said Mannor in Fee-simple, or for life or years, but never in Fee-tail but then) the said Henry Hall surrendered his said Copyhold Land, to the use of Joane his eldest Daughter for her life, the remainder to John Gravenor the eldest Son of the said Joane, and to the Heirs of his body, the Remainder to Henry Gravenor her other Son, and the Heirs of his body, the Remainder to the right Heirs of the said Henry Hall for ever; whereupon in 3 H. 8. at the Court then there holden, a grant was made by Copy of Court Roll accordingly, and Seisin given to the said Joane by the Lord accordingly.

Henry Hall died, having Issue the said Joane and one Elizabeth, and at the Court holden within the said Mannor, 4 H. 8. the death of the said Henry Hall was presented by the Homage, and that the said Daughters were his Heirs, and that the Surrender made as before was void, because it was not used within the said Mannor to make Surrenders of Estates tails, and thereupon the said Homage made division of the said Land, and limited Fairchildes for the purparty of the said Joane, and Preachers for the purparty of the said Elizabeth, and Seisin was granted to them accordingly.

Elizabeth died seised of her said part, after which 33 H. 8. Margaret her Daughter was found Heir to her, and admitted Tenant to this part; after which Joane dyed seised of the said Tenements as the Law will.

And after the said Margaret takes to Husband one John Adye, who with his said wife surrendered his said part to the use of the said John Adye and of his said wife, and of their Heirs; and afterwards the said Margaret died without Issue, and the said John Adye held the part of his said wife, and surrendered it to the use of the said Richard Brook, and of one John North, and their Heirs who were admitted accordingly, after which, the said John Gravenor died without Issue, and now the said Henry Gravenor was sole Heire to him, and also to the said Henry Hall who had Issue Edward Gravenor, and dyed, the said Edward entred into the said Lands called Preachers, and did let it to the Plaintiff, upon whom the said Richard Brook and the other Defendants did re-enter and eject him. And all this appeareth upon a speciall Verdict.

And by Clench and Gawdy, an Estate tail cannot be of Copyhold Land, unlesse it be in case where it hath been used, for the Statute of Donis conditionalibus shall not enure to such customary Lands, but to Lands which are at common Law, and therfore an Estate tail cannot be of these customary Lands, but in case where it hath been used time out of mind, and they said, that so it hath been lately taken in the Common Bench; But they said, that the first remainder limited to the said John Gravenor here upon the death of the said John, was a good Fee-simple conditional, which is well warranted by the custom to demise in Fee, for that which by custom may be demised of an Estate in Fee absolute, may also be demised of a Fee-simple conditional, or upon any other limitation, as if I. S. hath so long Issue of his body, and the like, but in such a case no Remainder can be limited over, for one Fee cannot remain over upon another, and therfore the Remainder to the said Henry was void: But they said, that for all the life of the said John Gravenor, nothing was in the said Elizabeth which could descend from her to the said Margaret her Daughter, or that might be surrendered by the said Margaret and her Husband, and therfore the said Margaret dying without Issue, in the life time of the said John Gravenor who had the Fee-simple conditional, nothing was done which might hinder the said Edward, Son to the said Henry Gravenor of his Entry, and therfore the said Plaintiff ought to have his Judgment to recover, for they took no regard to that which the Homage did, 4th. year of Hen. 8.

But Fennor and Popham held, that an Estate tail is wrought out of Copyhold Land by the equity of the Statute of Donis conditionalibus, for otherwise it cannot be that there can be any Estate tail of Copyhold Land, for by usage it cannot be maintained, because that no Estate tail was known in Law before this Statute, but all were Fee-simple, and after this Statute it cannot be by usage, because this is within the time of limitation, after which an usage cannot make a prescription, as appeareth 22 & 23 Eliz. in Dyer: And by 8 Eliz. a Custom cannot be made after Westm. 2. And what Estates are of Copyhold land, appeareth expressly by Littleton, in his Chapter of Tenant by Copyhold, &c. And in Brook Title, Tenant by Copyhold, &c. 15 H. 8. In both which it appeareth that a Plaint lyeth in Copyhold Land in the nature of a Formedon in the Descender at common Law, and this could not be before the Statute of Donis conditionalibus for such Land, because that before that Statute there was not any Formedon in the Descender at common Law, and therfore the Statute helps them for their remedy for intailed Land which is customary by equity: And if the Action shall be given by equity for this Land, why shall not the Statute by the same equity work to make an Estate intail also of this nature of the Land? We see no reason to the contrary; and if a man will well mark the words of the Statute of Westm. 2. cap. 1. he shall well perceive that the Formedon in Descender was not before this Statute, which wills that in a new case a new remedy may be given, and therupon sets the form of a Formedon in Descender: But as to the

the Formedon in the Reverter, it is then said, that it is used enough in Chancery, and by Fitzherbert in his *Natura brevium*, the Formedon in the Descender is founded upon this Statute, and was not at Common Law before; And the reason is, because these Copyholds are now become by usage to be such Estates that the Law allows them to be good against the Lords themselves, they performing their Customs and Services, and therefore are more commonly guided by the guides and rules of the common Law, and therefore as appeareth in Dyer, Tr. 12. Eliz. *Possessio fratris, of such an Estate, facit sororem esse heredem.* And to say that Estates of Copyhold Land are not warranted but by custom, and every Custom lies in Usage; and without Usage a Custom cannot be, is true, but in the Usage of the greater the lesser is alwaies implied: As by Usage, three lives have been alwaies granted by Copy of Court Roll, but never within memory, two, or one alone, yet the grant of one or two lives only is warranted by this Custom, for the use of the greater number warrants the lesser number of lives, but not e converso: And so Fee-Simples upon a Limitation, or Estates in tail are warranted by the equity of the Statute, because they are lesser Estates then are warranted by the Custom, and these lesser are implied as before in the greater, and none will doubt but that in this case the Lord may make a Demise for life, the Remainder over in Fee, and it is well warranted by the Custom, and therefore it seems to them that it is a good Estate tail to John Gravenor, and a good Remainder over to Henry his Brother, and if so, it follows that the Plaintiff hath a good Title to the Land, and that Judgment ought to be given for him. And for the dying seised of Elizabeth, they did not regard it, for she cannot dye seised of it as a Copyholder, for she had no right to be Copyholder of it: And by the dying seised of a Copyholder at common Law, it shall be no prejudice to him who hath right, for he may enter; But here in as much as she cometh in by admittance of the Lord at the Court, her Occupation cannot be fortious to him, and therefore no descent at common Law by her dying seised, for it was but as an Occupation at Will. But if it shall not be an Estate tail in John Gravenor, as they conceive strongly it is, yet for the other causes alledged by Gawdy and Clench, Judgment ought to be given for the Plaintiff, and the Remainder which is not good shall not prejudice the Fee-simple conditionall granted to John, which is no more then if the Surrender had been to the use of John Gravenor and his Heirs, the Remainder over, because that we as Judges see that this cannot be good by Law, and therefore not to be compared to the case where the Custom warrants but one life, and the Lord grants two jointly or successively, there both the one and the other is void: And this is true, because the custom is the cause that it was void, and not the Law, and also it is a larger Estate then the Custom warrants, which is not here, and upon this Judgment was given that the Plaintiff shall recover.

And by Popham, it hath been used, and that upon good advice in some Harbours, to bar such Estates tails by a common Recovery prosecuted in the Lords Court, upon a Plaint in nature of a Writ of Entry in the Poss.

2. Julius Cesar Judge of the Admiralty Court, brought an Action upon the Case for a Slander against Philip Curtine a Merchant-Stranger, for saying, that the said Cesar had given a corrupt Sentence; And upon not guilty pleaded, and 200. marks Damages given, it was alledged in arrest of Judgment, where it was tryed, by Nisi prius at the Guildhall by a partiall Inquest, because that upon the default of Strangers, one being challenged and tryed out, a Tale was awarded De circumstantibus by the Justice of Nisi prius; whereas (as was alledged) a Tale could not have been granted in this case, for the Statute of 35 H.8 cap.6. which give the Tales is to be intended but of commontrials of English, for the Statute speaks at the beginning but of such Juries

Juries, which by the Law ought to have 40 s. of Freehold, and wills that in such cases the Venire facias ought to have this clause, Quorum quilibet habeat 40 s. in terris, &c. which cannot be intended of Aliens which cannot have Freehold: And it goes further that upon default of Jurors, the Justices have authority at the Prayer of the Plaintiff or Defendant, to command the Sheriff or other Minister to whom it appertaineth to make a return of such other able persons of the said County, then present at the same Assises or Nisi prius which shall make a full Jury, &c. which cannot be intended of Aliens but of Subjects, and therefore shall be of tryals which are onely of English, and not of this Inquest which was part of Aliens.

And further the Tales was awarded only of Aliens, as was alledged on the Defendants part, but in this point it was a mistake, for the Tales was awarded generally de circumstantibus, which ought alwaies to be of such as the principall Person was. But Per Curiam the exceptions were disallowed, for albeit the Statute is, as hath been said, yet when the Statute comes to this clause, which gives that a Tales may be granted by the Justices of Nisi prius, and is generally referred to the former part of the Act, for it is added; Furthermore be it enacted, that upon every first Writ of Habeas Corpora, or Distringas with a Nisi prius, &c. the Sheriff, &c. shall return upon every Juror 5 s. Issues at the least, &c. which is generall of all: And then it goes further, And wills, that in every such Writ of Habeas Corpora, or Distringas with a Nisi prius where a full Jury doth not appear before the Justices of Assise, or Nisi prius, that they have power to command the Sheriff, or other Minister to whom it appertains, to nominate such other persons as before, which is generall in all places where a Nisi prius is granted, and therefore this is not excepted neither by the Letter nor intent of the Law. And where it is said (such persons) by it, is to be intended such as the first, which shall be of Aliens, as well as English, where the case requires it, for expedition was as requisite in cases for, or against them, as if it were between other persons. And Aliens may well be of the County or place where the Nisi prius is to be taken, and may be there: for although an Alien cannot purchase Land of an Estate of Freehold within the Realm, yet he may have a house for habitation within it, for the time that he is there, albeit he be no Denison, but be to remain there for Merchandise, or the like: And by Gawdy, where the default was only of Strangers, the Tales might have been awarded only of Aliens, as where a thing is to be tryed by Inquest within two Counties, and those of the one County appear, but not those of the other, the Tales might be of the other County only.

Davies *versus* Gardiner.

3. **A**ction upon the case for a Slander was brought by Anne Davies against Iohn Gardiner; That whereas there was a Communication of a Marriage to be had between the Plaintiff and one Anthony Elcock, the Defendant to the intent to hinder the said Marriage, said, and published, that there was a Grocer in London that did get her with Child, and that she had the Child by the said Grocer, whereby she lost her Marriage. To which the Defendant pleaded not guilty, and was found guilty at the Assises at Aylesbury to the Damages of 200. marks: And now it was alledged in Arrest of Judgment, that this matter appeareth to be meerly spirituall, and therefore not determinable at common Law, but to be prosecuted in the spirituall Court. But per Curiam the Action lies here, for a woman not married cannot by interment have so great advancement as by her Marriage, whereby she is sure of maintenance for her life, or during her Marriage, and Dower and other benefits which the temporall Lawes gives by reason of her Marriage

Vide this case reported, Cook lib. 4. 16. b.

age, and therfore by this slander she is greatly prejudiced in that which is to be her tempozall advancement, for which it is reason to give her remedy by way of Action at common Law: As if a woman keep a Whoring house, to which divers of great credit repair, wherby she hath her livelihood, and one will say to her Guests, that as they respect their credits, they take care how they use such a house, for there the woman is known to be a Bawd, wherby the Guests avoid her house, to the losse of her husband, shall not she in this case have an Action at common Law for such a slander? It is cleer that shee will. So, if one saith, that a woman is a common Strumpet, and that it is a slander to them to come to her house, wherby she loseth the advantage which she was wont to have by her Guests, she shall have her Action for this at common Law.

So here upon these collaterall circumstances, wherby it may appear that she hath more prejudice then can be by calling of one Harlot, and the like.

And Judgment was given for the Plaintiff.

Hillary Term, 36 Eliz. in the Kings Bench.

In Michaelmas Term, 33, & 34 Eliz. Rot. 181. William and Joane his wife, Administratrix of Andrew Stock, brought an Action upon the Case upon an Assumpsit, made to the Intestate for the payment of 5 l. to William Stock, who imparled untill Tuesday next after, Octa. Hillary next, which was the 24th. day of January, and then the Defendant demanded Oyer of the Letters of Administration which were entred, in hæc verba.

Wherby it appeareth that the Letters of Administration were committed to the said Joane by Thomas Taylor Batchelor of Law, Commissary to the Bishop of London, &c. wherby the Defendant pleaded, that after the last continuance, the said Letters Patents of Administration, sealed with the Seal of the Vicar Generall of the said Bishop, which he useth in this behalf, and brought here into Court, bearing date the 27th. day of January 1591 which was three daies after the continuance, committed the Administration to the said Defendant. And pleaded further the Act of 37 H.8. which sayes, that it shall be lawfull hereafter for any person, being a Doctor of the Law, to be Chancelloz, Commissary, or to exercise Ecclesiasticall Jurisdiction, albeit he were a meer Lay person, so that such a person be a Doctor as aforesaid, and avers, that at the time of the committing of the Administration to the said Joane, the said Thomas Taylor was a meer Lay person, and not Doctor Legis civilis nec minister allocatus, according to the Laws of the Church of England, wherby he had no lawfull power to commit the Administration.

Upon which it was demurred generally, and by all the Court the Plaintiff had Judgment to recover; for we are to consider what our Law was in this case before this Statute of 37 H.8. And albeit a Doctor then affirmed, that the Canon Law was, that there was a meer nullity in such Administration, so although the party that did it, not being a Clerk nor Doctor, according to the Stat. of 37 H.8. yet all the Justices agreed, that the Administration so committed will be adjudged in our Law to be of force and effect, being shewn under the Seal of the Officer and committed by him, who is reputed the Officer, who ought to do it, and is invested in the Office untill it be avoided by sentence, and yet such an avoidance shall not make a mans act to be made void, no more then if a meer Lay man be presented to a benefice, albeit this be a meer nullity in our Law, and void, yet we adjudge the Church full, according to the publike admission, constitution and induction, and not according to the capacity of the person, which is a thing secret, untill such a one be deprived for it by sentence in the spirituall Court, and yet the Church shall be in our Law void but from the time of deprivation, of which notice ought to be given to the Patron.

So here, he remains as to our Law an Officer untill his authority be defeated by sentence of the spirituall Court, otherwise great mischief will happen; for an infinite number of Administrations may be drawn in question by Argument, that he, who granted them was a meer lay person, and so make such Garbolls in the Common-wealth, which is not to be suffered for the inconvenience which will happen by it; and therefore our Law which is founded upon reason shall judge of it according to the open appearance of the Officer, to wit, that he hath a grant made to him, and not according to the private capacity of the person, and this is not altered by the said Statute which is made in affirmation of it, and makes the authority of a Doctor of Law absolute, not to be defeated by the Civill or Canon Law, which is not in the other case: But yet it doth not make this case of worse condition then it was at Common Law. And by all the pleading of the Administration committed to the Defendant, is not good, because it appeareth by the date of it, that it was made after the day of the last continuance, and therefore could not have been pleaded untill a new continuance after: And by the Doctor the last Administration does not avoid the first, but in case where there is an especial revocation of the first: But they did not speak of the doubleness because the Demurrer was generall and not speciall, and also because the other matters were so cleer.

Property.

2. **I**n Trespasse for carrying away certain Loads of Hay, the case hapned to be this; The Plaintiff pretending Title to certain Hay which the Defendant had standing in certain Land, to be more sure to have the Action passe for him, took other Hay of his own (to wit, the Plaintiff) and mixed it with the Defendants Hay, after which the Defendant took and carried away both the one and the other that was intermixed, upon which the Action was brought, and by all the Court cleerly the Defendant shall not be guilty for any part of the Hay, for by the intermixture (which was his own act) the Defendant shall not be prejudiced as the case is, in taking the Hay. And now the Plaintiff cannot say which part of the Hay is his, because the one cannot be known from the other, and therefore the whole shall go to him who hath the property in it with which it is intermixed, as if a man take my Garment and Embroider it with Silk, or Gold, or the like, I may take back my Garment, But if I take the Silk from you, and with this, face or embroider my Garment, you shall not take my Garment for your Silk which is in it, but are put to the Action for taking of the Silk from you.

So here, if the Plaintiff had taken the Defendants Hay and carried it to his house, or otherwise, and there intermixed it with the Plaintiffs Hay, there the Defendant cannot take back his Hay, but is put to his Action against the Plaintiff for taking his Hay. The difference appeareth, and at the same day at Serjeants Inne in Fleetstreet, the difference was agreed by Anderson, Periam, and other Justices there, and this case was put by Anderson: If a Goldsmith be melting of Gold in a Pot, and as he is melting it, I will cast Gold of mine into the Pot, which is melted together with the other Gold, I have no remedy for my Gold, but have lost it.

Bullock *versus* Dibler.

3. **I**n an Ejectione firmæ between Edward Bullock Plaintiff, and John Dibler Defendant, the case appeared to be this; A man was seised of a Copyhold Tenement, parcell of the Mannor of Stratfield Mortimer, the County of Berks, in right of his wife, in his Demesne as of Fee, and surrendered this Copyhold Tenement by himself without his wife, to the use of a stranger in Fee, who was admitted by the Lord accordingly, the Husband dies, the wife dies

dies, the Heir of the wife without any admittance enters upon the stranger, and makes a Lease for a year to the Plaintiff, upon whom the Defendant in right of him to whom the Surrender was made, re-enters, and adjudged that the Plaintiff ought to recover, and that the surrender of the Husband was not as a discontinuance against the wife, to put the Heir to his Plaintiff in nature of a Sur Cui in vita, for a Discontinuance shall not be by a Deed of Feoffment only, but by it with the Libery ensuing, whereby the entire Fee, simple is given, what Estate so ever the Feoffor had by reason of the Libery, where by Deed of Grant nothing passed but that which the party might lawfully grant: And here it shall be taken as if the Grant had been made by the Husband which passed but his Estate, to wit, that which he might lawfully grant without prejudice to his wife. But yet there is this diversity between a surrender of an Estate for life, and a surrender of an Estate in Fee to the use of a stranger, to wit, that by the one the Estate is drownd in the Lord by the surrender, and by the other it is not drownd in the Lord, but is transferred to him to whom it was made, upon which he is admitted to it; otherwise, in the last case it returns to him who surrendered, and then upon the admittance he is in the Per by him who surrendered, and not by the Lord, or by the Surrender made by Tenant for life, he to whose use it is made ought to take it of the Lord, and he is there in by him, and not by him who surrendered.

And this is the common difference betwixt Customary Estates for lives, and Customary Estates of Inheritance.

And the Plaintiff Cui in vita is given where recovery by default is against the husband and wife, and not upon the surrender of the husband; for suppose the husband had surrendered meerly to the Lord himself, yet the wife might have entred after the death of the husband, because the surrender goes but to the Estate which the husband might lawfully part with, and therefore rather to be resembled to a Grant then to a Feoffment.

And notwithstanding that he was not admitted, yet he might enter and take the profits, and make a Lease according to the custom, or bring an Action of Trespasse against him who disturbs him? But if the Lord require his Fine or his Services, and the Heir refuse to do them, this may be a forfeiture of his Copyhold; But untill lawfull Seisin made by the Lord (because it belongeth to him) the Heir may intermeddle with the Possession, albeit he be not admitted by the Lord where it is an Estate of Inheritance by the Custom.

And in this Term also in another case, in the same Court it was adjudged, that an Infant who surrenders his Copyhold Land within age, may enter at his full age, without being put any Suit for it.

And the first case was very well argued by one Brock, a Puny utter Barister of the Inner-Temple, this Term for the Plaintiff. And it was the first Demur that he argued in Court.

Forth *versus* Holborough.

4. **I**n an Action of Debt upon an Obligation of 200. marks brought by Robert Forth Doctor of Law, and Mary his Wife, as Executrix to Doctor Drewry, against Richard Holborough, the Case upon Demurrer appeared to be this; to wit, That the said D^r. Drewry was seised in his Demesne as of Fee, of the Suit of the Mannor of Goldingham Hall in the County of Essex, and so seised the last day of Novemb. 27 Eliz. demised it to the said Richard Holborough for 17. years from the said last day of Novemb. whereby the Defendant entred into it the next day, and was therof possessed accordingly, and so possessed the last day of Novemb. 28 Eliz. entred into an Obligation to the said D^r. Drewry, with condition, that if he, his Heirs, Executors, Administrators

Stratozs and Assignes, oꝛ any of them should well and truly pay oꝛ cause to be paid to Dorothy Goldingham widow, oꝛ her Assigns, at the Mannor-house of Goldingham Hall in the County of Essex, foꝛ the Term of 17. years, from the Feast of S. Michael the Archangel then last past, oꝛ an Annuity oꝛ annuall Rent of 20. marks of lawfull English money, at the Feast of the Annunciation of our Lady, and S. Michael the Archangel, by equall portions, if the said Dororhy shall so long live, and the said Richard Holborough, oꝛ his Assigns, oꝛ any other claiming by, oꝛ under the said Richard, oꝛ his Assigns, shall oꝛ may so long occupy oꝛ enjoy the said Scite of the Mannor of Goldingham Hall, that then the Obligation shall be void; after which untill the 9th. day of May, 29 Eliz. the Defendant enjoyed the said Scite, and paid duly the said Annuity, and then he surrendred his Estate in the said Scite to the said D^r. Drewry, and after this did not pay the Annuity ober, and yet continued the possession of the said Scite.

And by all the Justices the Defendant notwithstanding the Surrender made to the Obligee himself, ought to have continued the payment of the Annuity to the said Dorothy, foꝛ albeit the Term be drownd, and merged in the Reversion, and so hath no continuance as to him in the Reversion, yet as to any thing heretofore done by the Defendant who was the Termor in Judgment of Law, it is to be said to have continuance: As if he had granted a Rent-charge out of it to have continuance during the said Term, although he surrender his Term to him in the Reversion, yet the charge continues, and as to it, the Reversion shall be said to be in the Termor, and albeit the Obligee himself shall not take advantage of his own, oꝛ to have the advantage of the forfeiture of an Obligation there, where his own act is the cause of his breach.

And if it had been, that the said Dorothy during the said Term shall have the use of a Chamber within the Scite, without the interruption of him, oꝛ his Assigns, there, if after the Surrender, the said Dorothy Drewry had interrupted him of the use of the said Chamber, the forfeiture of the Obligation shall not be taken against the Defendant foꝛ it.

But here the Condition is of a collateral thing to be done, to wit, the payment of the Annuity to a stranger, with which the Land is not bound, and therfore the breach comes meerly in default of the Obligoꝛ, and of the Obligee in no part, to wit, and therfore the Obligation here is forfeited.

And by Popham, the case here is moze cleer upon consideration of the words of the Condition, foꝛ the words are, If the Defendant shall, or may enjoy, &c. and this word (may enjoy) shall be alwaies intended reasonably, to wit, if it may without any thing to be done by him to the contrary; and here if he had not made the Surrender, he might have enjoyed the Scite untill the end of his Term, and therfore because it cometh of his own act, whereby he, oꝛ his Assigns shall not enjoy it foꝛ the Term, if it shall be said, that he in the Reversion shall not be said in, by the Termor of which he himself shall not take any advantage, in as much as if this had not been, he might have enjoyed foꝛ the whole Term. To which all the other Justices also agreed, and upon this Judgment was given foꝛ the Plaintiff.

But if any had defeated the said Term by a lawfull entry, by a Title Paramount, the Obligation had not been forfeited foꝛ any default of payment after this Entry, but if Rent had been reserved upon the Lease, and foꝛ default of payment, a Re-entry had been made, yet by Popham the payment ought to be continued upon the perill of the forfeiture of the Obligation, foꝛ the words (may enjoy) in as much as there it is the meer default of the Defendant himself, there the Lease does not continue, of which he shall not take advantage to save his Obligation. But note the form of the Demurrer, and that it might have been better ioynd, which is to be seen in the Record where it is entred.

Easter Term 36 Eliz.

Geilles *versus* Rigeway.

In debt for 306. 16. s. 8 d. by William Geillies, against Thomas Rigeway Esq; late Sheriff of Devon; for that whereas John Chaunder alias Chaundeler, was in execution with the said Sheriff for the said sum, the said Sheriff afterwards, to wit, the tenth day of December, 34 Eliz. at London, in such a Parish and Ward suffered him to escape, the said Rigeway then being Sheriff of Devon, and having him then in execution, &c. To which the Defendant pleaded, how that he took him in Execution by the Wroces at Stockram in the County of Devon, as the Plaintiff hath alledged, and there detained him in safe custody untill the 8th. day of December, 34 Eliz. at which day the said Chaundeler broke the Prison, and escaped out of it contrary to the will of the said Defendant, and that the Defendant did freshly pursue him, and in this fresh pursuit did re-take him the 11th. day of December, then next ensuing at Stockram aforesaid, and detained him in execution for the said 306. 16. s. 8 d. during the time of his Office, and delivered him over to the new Sheriff, &c. To which the Plaintiff replied by protestation, that he did not make fresh pursuit; And for plea saith, That after the going away of the said Chaundeler, and before his re-taking by the said Defendant as aforesaid, the said Chaundeler for a whole day and night, to wit, at London, in the Parish and Ward aforesaid, was out of the view of the said Defendant, &c. Upon which it was demurred in Law.

And it was moved by Cook Attorney-generall, that Judgment ought to be given for the Plaintiff; for, in as much as it was alledged, that he was out of the view of the Sheriff for a day and a night together, there it shall be intended to be a default in the Defendant in the making of his pursuit, and therefore chargable to the Plaintiff, and yet he agreed, that if the Sheriff had made his pursuit freshly; although that at the turning of a Lane, end of a house, or the like, the Prisoner had been out of the view of the Sheriff for a small time, as untill the Sheriff cometh to this turning, end of the house, or the like, yet the Sheriff may re-take the Prisoner, and he shall be yet said to be in execution to the party against his will, yet when he is for so long a time out of his view, it shall be otherwise, for the default which the Law presumes to be in him; and therefore in this case the action lies. To which it was answered by Popham, Gawdy, and Clench, That if he makes fresh pursuit, so that it doth not appear fully that there was a default in the Sheriff in his pursuit, although he were so long out of his view, yet he shall be said to be in execution for the party against his will upon the retaking of him: As if he be pursued to a house where he is kept for a long time, and the Sheriff set a guard upon the house, and after this re-take him the next, or any other day without departing from thence, the Sheriff in such a case may re-take him upon his coming out of the house, and he shall be in execution to the party against his own will.

And so in all like Cases; As if he pursues him in the night, so as he cannot see him, and yet by the tract of the horse, or enquiry he makes diligent pursuit to re-take him, so that it cannot appear that there was any negligence or default in him in making pursuit.

And it is not the form of the pleading to alledge, that he pursued him freshly, and had him alwaies in his view untill he re-took him, but only that he pursued him freshly and took him in this fresh pursuit, without saying any thing that he was in his view, and therefore his being out of the view of the Sheriff is not material in the case, but the fresh pursuit, and the taking of him in this pursuit.

Then Coke moved, that the Bar was not good, because he doth not shew where he made the pursuit, so that he might agree to answer that which is alledged by the Plaintiff, to wit, his being at large at London, and therefore the Bar not being good, Judgment shall be given against the Defendant for the insufficiency of his Bar: for a Repleader shall not be in case of Demurs, as it hath been adjudged here very lately, and also in the Common Bench.

To which it was answered by the said Justices, That if the Bar be insufficient in matter, so that it may appear by it, that the Plaintiff hath sufficient cause of Action, which in matter is not sufficiently avoided by the Bar, Judgment shall be given for the Plaintiff upon the Bar, if the Replication be sufficient, and no Repleader; but if the Bar be sufficient for the matter and insufficient for the form only, as it is here, there before the Statute of Eliz. for pleading there shall be a Repleader, but now because no Demurrer was upon the Bar, but a Replication made to it, therefore by Popham no advantage shall be taken of the Bar for matter of form, which is admitted by the party, and no advantage taken thereof according to the Statute.

And they all agreed, that the Sheriff, albeit he did not make fresh pursuit upon the escape, may yet take, re-take the Prisoner who escaped from him out of Execution, for the Prisoner shall not take advantage to avoid the Execution; and therefore in respect of the Plaintiff, who yet may accept the Prisoner to be in execution, the Sheriff may re-take the Prisoner. But if the Plat. had recovered against the Sheriff before for the escape, then the Sheriff for his Indemnity cannot re-take him, but is put to his Action upon the Case against the Prisoner, for the Sheriff hath no colour in such a case of escape to re-take him, but in respect, and for the advantage of the Plaintiff, who had Judgment against the Prisoner, and not in respect of the private wrong done to himself, of which he hath no Judgment, and as it is now, the Replication not being good (by Popham) Judgment ought to be given against the Plaintiff. But by assent it was ordered that the Defendant shall put in new Bail, and that upon it, he shall plead anew; But how shall it be if the Sheriff do not make fresh Suit and re-take him? And afterwards he, at whose Suit he was in Execution recovered against the Sheriff; may the Prisoner have an Audita querela upon the matter?

Upon an Assembly of all the Justices at Serjeants-Inn in Fleetstreet, with the Barons of the Exchequer, it was clearly agreed by them all (but two, who at the beginning made some doubt of it, but at the end assented also.)

If in the night, the house of any be broken, with an intent to steal any thing being in the house, although no person be in the house at this time, yet this is Burglary, for the Law is, that every one shall be in security in the night, as well for their Goods as their persons which be in the house.

And if a Church be broken in the night for the stealing of any thing in it, this is Burglary, though no person be in it at this time. And so hath the Law alwaies been put in execution, and in all the Books which speak of Burglary, it is not mentioned that any person ought to be in the house, but that it is Burglary, the Dwelling being broken in the night, to the intent to kill any person there, or to the intent to steal any thing out of it.

And the case that of late time it hath been put in the Inditeiments of Burglary, that some person was then there, &c. hath been, because that in such cases of Burglary, Clergy was taken away, but now by the Statute of 18 Eliz. Clergy is taken away in every case of Burglary.

And the ancient Presidents are, Quod domum of such a one Noctanter Felonice & burglariter fregit, without making mention that any person was then in it, or making mention that it was Domus mansionalis of any: And it may be a Mansion House, albeit no person then inhabit in it. And agreed that

that hereafter it shall be so put in execution by all the Justices. See this more fully hereafter, Trin. 36 Eliz. Pl. I. in this Book.

ATres Paschæ this Term there were made for Serjeants at Law; viz. Lewkenor, Savage and Williams of the Middle-Temple, Heale only of the Inner-Temple, Kingsmill, Warburton, Branthwaite, and Flemming of Lincolns-Inn, and Daniel and Spurling of Grayes-Inn.

And all the Justices were assembled in the Middle-Temple Hall, the Wednesday past Mensen Paschæ, being the second day of May, where the two chief Justices, and chief Baron sate upon the Upper-Bench of the same Hall, in their Scarlet Robes with their Collers of S. S. and every one of the other Justices and Barons in their Ancienty; one on the one side, and the other on the other side in their Scarlet Robes also, and then came the new Serjeants in their black Gowns befoze the Justices there, the two eldest being put in the midst befoze the chief Justice of England, and so every one of them, one on the one side, and the other on the other side, according to their Ancienty, and every one of the said Serjeants having one of his Servants behind him at his back, with his Masters Scarlet Hood and Coife upon his arms: And therupon the said chief Justice made his Speech in this manner.

IF men will enter into a due consideration upon what grounds the Laws of this Realm have their Original Foundation, and what good effects are wrought through the due execution of the same they might say, and that justly, that the profession therof is both an honest, and honourable Profession.

The Laws are derived partly from the law of God and partly from the Law of Nature. From the Law of God, in that it ordaineth means how the people may be truly instructed in the knowledge and fear of God: How they should demean themselves towards their Sovereign and Prince: How they ought to live one with the other, and how to be defended from oppressions and injuries. From the Law of Nature, in that it provideth how each man may defend himself, that he may live by his own labours, or otherwise according to his profession or calling; That he may secure his Posterity of that which he hath gathered together by his industry, and that man with man may live together in such secure and comfortable Society as appertaineth. And what be the effects which grow by the due execution of the Laws? They are these.

By it, God is known, the Sovereign Prince obeyed, the people are kept to live in peace, and that is yeilded to each which is his due: And can there be any better things then these upon the face of the Earth? No, there cannot. The Law therefore being taken from so good a ground, and working such notable and honourable effects, who can justly say otherwise, but that the profession of such a Law is an honourable profession? Are not the Judges of the Law professors of the Law? See then what God himself in his word hath said of Judges in *Psal. 82.* speaking of Judgment and Justices he saith thus; *I have said yee are Gods*, and can there be any higher name then this in Heaven or Earth? And why are they so learned? but for that, they in their Offices do resemble that which is the Office of God, as to discern so far forth as mans capacity can reach unto between right and wrong, truth and falshood, the just and the unjust, which is a most high, weighty and honourable charge, and therefore 2 *Chro: 19 6. cha. Jehosaphat* said to the Judges, *Take heed what you do, for you do not execute the judgments of men, but of the Lord, and He will be with you in judgment.* By which it is evident, that they are either grossly ignorant, or otherwise very malignant and contemptuous persons that may not be induced to be reformed, that do in any wise hold the profession to be either base or contemptible.

And

And this I may truly say to the encouragement and comfort of such as being honest do profess the Law: That in the most parts of *England* there are more Gentlemens houses, and those of continuance raised and advanced by that profession alone, then by all other the professions that can be spoken of, and approved,

Let any man of Experience in the State, of the generall part of the Realm enter into a due consideration of it, and I am well assured he shall find it so; wherby it may plainly appear, that Gods blessings for worldly benefits have greatly abounded towards such as have walked evenly and justly in that calling: yet happily there may be some (I mean such as slip in by extraordinary means) that sometime do give scandall to the Profession; as where such are called to the Degrees of Learning, as are either ignorant, or infamous persons, wherby they either cannot advise as they should, or by giving themselves over to flights and to shifts, they do not advise as they ought.

A matter abhorred of all good and honest men: But the same being duly weighed, tendeth to the touch of the person, and not of the Profession. Nevertheless to avoid this Scandall, I would advise;

1. Such as have Government in these houses of Court, should be very carefull and respective in their Calls, not only to the bench as Readers, but of those also whom they call to the Bar, that they may be such as may appear to be both learned, and honest, and such as may not justly be impeached of Ignorance, or Ignominy; for such are not only to advise between parties, but many of them are drawn to Credit and Government also in their Countries, and therefore behoofull to be free from such Imputations.

And sithence without the knowledge of the Law in some measure, such as govern in their Countries, may often fall to commit such Errors as were to be wished might be otherwise.

It were convenient that Gentlemen, yea, those of best worth would bring up their very heirs in the knowledge of the Laws, as that they might in after ages, when as they shall be called to Government, be so able to govern under her Majesty as might best stand with their Reputations, and the good of their Countries.

And now your selves that are here present, and have been called to this State and Degree of Serjeants at Law (a State and Degree I may well call it, for that her Majesty doth so term it) Since your gravities and your good conversations in your callings hither-to, and the good opinion conceived of your Learnings, Experiences, and Discretions hath moved her Majesty to call you to this Dignity,

I am now to advise you so to demean and govern your selves in your Profession as those good things thus conceived of you may not henceforth any waies be blemished, but rather encrease, to your further Reputations and Credits. In which you are to have a speciall regard that you be thankfull, first, to God, who hath so guided the course of your lives hither-to, as it hath made you to have been thought to have merited this Advancement. Then to her Majesty, who upon good report made, hath conceived so well of you as to call you to this Degree, wherein it behoveth you so to demean your selves, as in all her Highness Service, both in your Countries and otherwise, as you shall be called therunto, as you may be found to deal therein effectually, diligently, and justly.

And lastly, to the Country and Common wealth who hath carried so good a report of you, as therby you have been the rather brought to this place: And the most thankfulness you can shew to your Country, is, to Councell your Clients according to your skill honestly, and truly, wherby they may not be encouraged to spend their time and their substance in vain, frivolous, and unjust Suits; to be faithfull and secret to your Clients, not disclosing their Councils to their prejudice, that you expedite your Clients Cause

so far forth with conveniency, and your Clients safety, that both in your practice and otherwise, your speech and behaviour towards all men be modest and discreet, yea, such as appertaineth to men of your Gravities and Callings, that without respect of persons, yea, be bold to maintain your Clients honest Cause, so far forth as may stand with knowledge and discretion: And that in all things you respect more your honesties, then your profits.

And touching these points, you have a continuall memory, and that alwaies about you, in your very Garments: And therefore by the Coif, in respect it is white many things are signified, as Gravity, Wisdom, and Experience, for that these Virtues are proper to the gray haire, and white headed men.

There is also signified thereby, that you should be both honest and of an unspotted life; And in that it is fashioned like a Helmet, it signifieth, that you should be both bold to utter your knowledge in the Law, in the honest and just cause of your Client, without respect of persons whomsoever it concerneth. And by the party-colour'd Garments, being both of deep colours, and such as the Judges themselves in ancient time used, (for so we receive it by tradition) is signified soundness and depth of judgment and ability to discern of Causes, what colour soever be cast over it, and under, or with what vail or shadow soever it be disguised. For the wholeness and closeness of your Garments, they do signifie integrity to be used in your advices, and secrecy in your counsels. And in that the Garments being single and unlined, it betokeneth that you should be sincere and plain in your advices, and not double, carrying your opinion to your self one way, and you advise it your Client clean another way.

The two Tongues do signifie, that as you should have one Tongue for the Rich for your Fee, as a reward for your long studies and labours, so should you also have another Tongue as ready without reward to defend the Poor and Oppressed; And therein to shew your seves thankfull to God for all that which he hath bestowed upon you.

And for the Rings you give, as Gold is amongst all Mettals the purest, so should you be of all others of your Profession the perfectest both in knowledge and in the other Virtues before remembred: And in that it is a Ring, and round without end, it betokeneth that you have made a perpetuall Vow to this your Profession and Calling, and are as it were wedded unto it: And therefore I heartily wish you may alwaies walk therein according as appertaineth to your Calling.

And this done, the ancientst Serjeant beginneth to recite his pleading, and so each after other in order.

And that done, the ancientest kneeleth down before the chief Justice of England, and so the rest before the Justices and Barons as they are in ancienty, and had severally by the said chief Justice their Coifs put upon their heads, and then their red Hoods upon their shoulders, and then the Serjeants return to their Chambers, and put on their party-coloured Garments, and so walk on to Westminster the one after the other, as they be in ancienty, bare-headed, with all their Coifs on, and so are in their turn presented the one after the other, by two of the ancientest Serjeants: And after their pleadings recited, they give their Rings in the Court by some friends, and so are therupon set in their place at the Bar according to their ancienty.

And all this done, they return to their Chambers, and there put on their black Gowns, and red Hoods, and come into the Hall each standing at his Table according to his ancienty bare-headed, with his Coif on, and after setteth himself upon the Bench, having a whole mess of meat, with two courses of many Dishes served unto him; And in the afternoon they put on their Purple Gowns, and then go in order to Pauls, where it hath been accustomed that they heard Service, and had a Sermon.

Edwards *versus* Halinder.

4. **I**n an Action upon the Case by Rice Edwards against Edward Halinder; The Plaintiff declared by his Bill that one Edward Banister was seised in his Demesne as of Fee, of a Messuage in such a Parish and Ward in London, and being so seised did let to him the Cellar of the same house the 23. day of April, 32 Eliz. for a week, from the same day, and so from week to week, so long as the parties should please, at such a Rent by the week, whereby he was possessed.

And further, that the said Edward Banister being seised of the said house, as is aforesaid, afterwards, to wit, 29. July, in the 32. year aforesaid, gave to the said Defendant Officium, Anglice, the Warehouse of the said Messuage being right over the said Cellar, for a week from thenceforth, and so from week to week, so long as the parties should please, paying such a Rent, whereby the Defendant was therof possessed accordingly: And the Plaintiff being possessed of the said Cellar, and the Defendant of the Warehouse, as aforesaid, and the Plaintiff then having in the said Cellar three Butts of Sack to the value of 40 l. &c. The Defendant the 30. day of July in the 32. year aforesaid, put such a quantity of weight and burthen of Merchandize into the said Warehouse, and thereby did so overburthen the floor of the said Warehouse, so that by the force and weight of the said burthen, the said floor the said 30. day of July was broken, and by force thereof did fall, and that thereby the Merchandize that were in the said Warehouse did fall out of the said Warehouse into the said Cellar upon the said Vessels of Wine, and by force thereof brake the said Vessels of Wine, whereby the said Wine did spee out of the said Vessels, and became of no value, to the Plaintiffs damage of a hundred pound, &c. To which the Defendant saith, That within a small time before the Trespasse committed, the floor of the said Warehouse sustained as great a burthen of Merchandize as this was: And that the Warehouse was demised to him as the Plaintiff hath alledged to lay in it 30. Tun weight, whereby he was possessed, and so possessed the said 30. day of July, did put into the said Warehouse but 14. Tun weight of Merchandize, and that the damages which the Plaintiff had by the breaking of the floor, was, because the floor at the time of the laying of the merchandise upon it, & also before the lease made to him thereof was so rotten, and a great part of the Wall upon which the said floor lyes, so much decayed, that for default of Reparations and supporting thereof by those to whom the reparations did belong, before the Lease thereof made, it suddainly brake, which matter he is ready to aver; Whereupon the Plaintiff demurred, and Judgment was given for the Plaintiff in the Exchequer, upon which a Writ of Error was brought in the Exchequer Chamber, and the Error assigned was, that the Judgment ought to have been given for the Defendant, because that now it appeareth that there was not any default in the Defendant, for he was not to repair that which was so ruinous at the time of his Lease, and therefore if it did bear so much lately before, it cannot fall by the default of the Defendant in the weight put upon it, but by the ruinousnes of the thing demised; And yet by the advice of the Justices the Judgment was this Term affirmed: for the Plaintiff hath alledged expressly, that the floor brake by the weight of the Merchandize put upon it, which ought to be confessed and aboied, or traversed; whereas here he answers but argumentatively, to wit, that it did bear more before, therefore that he did not brake it by this weight, or that it was so ruinous that it brake. Ergo not by the weight: whereas here it is expressly alledged, that it brake by the weight put upon it, and if lesser weight had been put it would not have broken. And he who takes such a ruinous house ought to mind well what weight he put into it at his perill, so that it be not so much that another shall take

take any damage by it : But if it had fallen of it self without any weight put upon it, or that it had fallen by the default only of the posts in the Cellar which support the floor, with which the Defendant had nothing to do, there the Defendant shall be excused : But here it is expressly alledged, that it fell by the weight put upon it, which ought to be answered : As if a man take an Estate for life, or years in a ruinous house, if he pull it down he shall be charged in Waste, but if it fall of it self, he shall be excused in Waste ; so there is a diversity where default is in the party, and where not, so here, the Defendant ought to have taken good care, that he did not put upon such a ruinous floor more then it might well bear, & if it would not bear any thing, he ought not to put any thing into it, to the prejudice of a third person, and if he does, he shall answer to the party his damages.

Collard *versus* Collard.

5. **I**n an Ejectione firmæ brought by Constantine Collard against Richard Collard, the case appeared to be this ; Thomas Collard was seised in his Demesne as of Fee, of Lands in Winkle in the County of Devon, called the Barton of Southcote : And having two Sons, to wit, Eustace the eldest, and Richard (the now Defendant) the youngest, and the eldest being to be married, the said Thomas in consideration of this marriage, being upon the said Barton said these words.

Eustace stand forth, I do here, reserving an Estate for my own life and my wives life, give unto thee and thy Heirs for ever these my Lands, and Barton of Southcote ; after which the said Thomas enfeoffed his youngest Son of Barton, with warranty from him and his Heirs, the eldest Son enter, and let it to the Plaintiff, upon whom the Defendant re-enter, upon which re-entry the Action was brought, and upon a speciall Verdict all this matter appeared : But it was not found by the Verdict, that the said Thomas Collard the Father was dead, and therfore the Warranty was not any thing in the Case. And it was moved by Heale that the Plaintiff ought to be barred, because it did not passe by way of Estate, in as much as a man cannot passe a Freehold of a Land from himself to begin at a time to come, and by it to create a particular Estate to himself, and in use it cannot passe, because that by a bare parole an Use cannot be raised, and by giving my Land to my Son, Cousin, and the like, nothing will passe without Libery, for there is not consideration to raise an Use.

Fennor, The words shall be taken, as if he had said (here I give you this Barton reserving an Estate for my life) although the words of reservation have priority in their time from the speaking of them, because a reservation cannot be but out of a thing granted, and therfore the reservation shall be utterly void, or otherwise ought to be taken according to their proper nature, to wit, to be in their operation subsequent, and so shall not hurt the Grant, and therfore are not to be compared to the case where a man grant that after the death of I. S. or after his own death a stranger shall have his Land, which Popham granted.

And Fennor said further, that these words being spoken upon the Land, as before amount to a Libery.

Gawdy said, That the words as they are spoken amount to a Libery, if the words are sufficient to passe the Estate, but he conceived that the words are not sufficient to make the Estate to passe to the said Eustace, because his intent appeareth, that Eustace was not to have the Land untill after the death of him and his wife, and therfore of the same effect, as if he had granted the Land to the said Eustace after his death ; and as an Use it cannot passe, because by a bare word an Use cannot be raised, as appeareth in divers Reports.

Mich.

Mich. 12, & 13 Eliz. which is a good case to this purpose: But to say generally that an Use cannot be raised or charged upon a perfect Contract by words upon good consideration, cannot be Law; and therefore it is to be considered what the Law was before the Statute of 27 H. 8. And I thinke that none will deny, but that by grant of Land for money, before this Statute an Use was raised out of the same Land, for a bargain and sale of Land for money, and a grant of Land for money is all one, and no difference between them: And is not a grant of Land made in consideration of marriage of my Son and Daughter, as valuable as a grant of it for money? It is cleer that it is, and much more valuable, as my blood is more valuable to me then my money; and therefore it is absurd to say, that the consideration of money raises or change an Use at Common Law, and not such a consideration of marriage.

And in such a case at Common Law there was not any diversity, that the party who so grant or bargain for the one or the other considerations was seized of the Land granted, or bargained in use, or possession, but that the Use by the Contract was transferred according to the bargain in both cases where there is a consideration: And where through all the Law shall it be seen that of any thing which might passe by contract, there need any other thing then the words which make the contract, as writing or the like testifying it? And that the Law was so, it appeareth by the Statute of Inrolments of bargains and sales of Land made 27 H. 8. which enacts, that no Freehold, nor Use therof shall passe by bargain and sale only, unlesse it be by deed indented and enrolled according to the Statute; Ergo, if this Statute had not been, it had passed by the bargain and sale by bare words; and in as much as the Statute enacts this in case of bargain and sale only, the other cases, as this case here, are as it was before at Common Law. And by an exception at the end of the same Statute, London is as it was at Common Law, and therefore now Lands may passe there at this day by bargain and sale, by word without deed, for it is out of the Statute: And how can we say, that the Statute of Uses does any thing to alter the Common Law in this point, by any intent of the makers therof, whereas at the same Parliament they made an especiall Law in the case of bargain and sale of Lands. And at this day, for the Lands in London, notwithstanding the Statute of Uses, the Law hath been put in practice, and alwaies holden as to the Lands there to be good, if sold by bare Parole as it were at Common Law. And I have heard it reported by Manwood late chief Baron of the Exchequer, that it was in question in the time of King Edw. the 6th. whether the use of a Freehold of Land will passe upon a Contract by Parole without Deed in consideration of marriage; upon which all the then Justices were assembled upon a doubt rising in a case, hapning in the Star-chamber, and then resolved by all the Justices (as he said) that it shall passe; and he said, that himself was of this opinion also: And to say, that by grant of Land at Common Law, the use had been raised out of the possessions of the Land which the Grantor then had, and by it passe to the Bargaineer, and that it shall not be raised and passed to another by grant of Land in consideration of marriage, which is a more valuable consideration then money, is absurd and against all reason.

And for the solemnity, Uses in such cases (in respect of marriage) were the cause that they alwaies were left as they were at Common Law, and not restrained as the case of bargain and sale is, which by Common intentment may be made more easily and secretly, then that which is done in consideration of marriage, which is alwaies a thing publike and notorious, but it is not reasonable that every slight or accidentall speech shall make an alteration of any Use: As if a man ask of any one what he will give or leave to any of his Sons or Daughters for their advancement in marriage, or otherwise for their advancement, this shall be but as a bare speech or communication,

cation which shall not alter or change any Use: But where there is upon the Speech a conclusion of a Marriage between the friends of the parties themselves, and that in consideration thereof, they shall have such Lands, and for such an Estate, there the Use shall be raised by it, and shall passe accordingly to the parties, according to the conclusion which Fennor granted.

But by Popham, If it may be taken upon the words spoken, that the purpose was to have the Estate passe by way of making of an Estate, as by way of Feoffment, &c. then notwithstanding the consideration expressed, the use shall not change, nor no Estate by it but at will, untill the Libery made thereupon: And therefore if a man make a Deed of Feoffment, with expresse consideration of marriage, although the Deed hath words in it of Dedi & Concessi, with a Letter of Attorney to make Libery thereupon, there untill Libery made nothing passe but at will, because that by the Warrant of Attorney, it appeareth the full intent of the parties was, that it shall passe by way of Feoffment, and not otherwise, if it be of Land in possession: And if it be of Land in Lease, not untill Attozment of Tenants, which was granted by all the Justices.

But if a man in consideration of money makes a Deed of Gift, Grant, Bargain, and Sale of his Lands to another, and his Heirs by Deed indented, with a Letter of Attorney to make Libery, if Libery be thereupon made before Inrolement, there it hath been adjudged to passe by the Libery, and not by the Inrolement.

But by Popham, where Land is to passe in possession by Estate executed, two things are requisite: The one, the grant of the said Land, the other, the Libery to be made thereupon, for by the bare Grant without Libery, it doth not passe as by way of making of an Estate: And this is the cause that such solemnity hath been used in Liberities, to wit, if it were of a Messuage, to have the people out of it, and then to give Seisin to the party by the King of the doore of the House, and of Land by a Turff and a Twig, and the like, which may be notorious: Yet I agree it shall be a good Libery to say to the party, Here is the Land, enter into it, and take it to you and your Heirs for ever, or for life, or in tail, as the case is; And albeit Libery by the View may be made in such manner, yet by the sealing of the Deed of Grant upon the Land, or by grant of it upon the Land without Libery, nothing passe but at will. But if thereupon one party saith to the other after the Grant, or upon it, Here is the Land, enter upon it, and take it according to the Grant, this is a good Libery: But he ought to say this, or something which amounts to so much, or otherwise it shall not passe by the bare Grant of the Land, although it be made upon the Land. Cleach said, That when Thomas said to Eustace, Stand forth, here I do give to thee and thine Heirs these Lands, this amounts to a Grant and a Libery also; and by the words of the Reservation of the Estate to himself, and his wife for their lives, in this the Law shall make an use in the said Thomas and his wife for their lives: so that by such means it shall enure, as if he had reserved the use thereof to him and his wife, and so it shall enure to them as it may by the Law according to his intent, without doing prejudice to the Estate passed to the said Eustace: And afterwards Term Mich. 36, & 37 Eliz. the Case was again disputed amongst the Justices, and then Popham said, That the Case of Bargains and Sales of Lands in Cities, as London, &c. as appeareth in Dyer 6. Eliz. are as they were at Common Law; To which all the Justices agreed, and therefore shall passe by Bargain by parole, without writing. And by Bayntons Case in 6, & 7 Eliz. it is admitted of every side, that an Use was raised out of a Possession at Common Law by Bargain and Sale by parole, and otherwise, to what purpose was the Statute of Inrolements, and by the same case it is also admitted now to passe by parole upon a full agreement by words in consideration of Marriage, or the continuance of Name, or Blood.

For it is agreed there, that the consideration of nature is the most forceable consideration which can be, and agreed also that a bare Covenant by writing without consideration, will not change an Use, therefore the force therof is in the consideration, of which the Law hath great respect: And therefore the Son and Heir apparant ex assensu patris, onely may at the doore of the Church endow his wife of his Fathers Land, which he hath in Fee, and this is good by Littleton, although the Son hath nothing in it, whereby an Estate passe to the wife, which is more then an Use. Nature is of so strong consideration in the Law; And thereupon after advice, Judgment was given for the Plaintiff: the Roll of this appeareth in Banco Regis, 1 Hill 35. Eliz. Rot. 355. And upon this Judgment, a writ of Error was brought, and the Judgment also said reversed in the point of Judgment in the Exchequer, by the Statute of 27 Eliz.

Kettle *versus* Mason, and Esterby.

Vide this case
Coke lib. 1.
146, &c.

6. **I**n a second deliberance between Joh. Kettle Plaintiff, and George Mason and Francis Esterby, Abowants, the case appeared to be this: Thomas May was seised of the Mannor of Sawters and Hawlin, in the County of Kent, in his Demesne as of Fee, and being so therof seised, enfeoffed Thomas Scot and John Fremling and their Heirs, to the use of Dennis May his Son and Heir apparant and his Heirs, upon condition, that the said Dennis and his Heirs should pay to one Petronell Martin for his life, an annuall Rent of 10 l. which the said Thomas had before granted to the said Petronell, to begin upon the death of the said Thomas; And upon condition also, that the said Thomas upon the payment of 10 s. by him to the said Feoffees, or any of them &c. might re-enter: After which the said Thomas May and Dennis, by their Deed dated 30. May, 19 Eliz. granted a Rent-charge out of the said Mannor of 20 l. a year to one Anne May for her life, after which the said Thomas May paid the said 10 s. to the said Feoffees in performance of the Condition aforesaid, and thereupon re-entered into the Land and enfeoffed a stranger: And whether by this the Rent were defeated, was the question: And it was moved by Coke Attorney generall that it was not, but that in respect that he joynd in the part, it shall enure against the said Thomas by way of confirmation, which shall bind him as well against this matter of Condition, as it shall do against any Right which the said Thomas otherwise had. And therefore by Littleton, If a Disseisor make a Lease for years, or grant a Rent-charge, and the Disseisor confirm them, and afterwards re-enters; albeit Lit. there makes a Quære of it, yet Cook said, That the Disseisor should not avoid the Charge, or Lease which was granted by the whole Court. And by him the opinion is in P. 11. H. 7. 21. If Tenant in Tail makes a Feoffment to his own use upon Condition, and afterwards is bound in a Statute, upon which Execution is sued, and afterwards he re-enter for the Condition broken, he shall not avoid the Execution, no more the Rent here.

Fennor agreed with Cook, and said further, That in as much as every one who hath Title and Interest have joynd in the Grant, it remains perpetually good.

And therefore if a Parson at Common Law had granted a Rent-charge out of his Rectory, being confirmed by the Patron and Ordinary, it shall be good in perpetuity, and yet the Parson alone could not have charged it, and the Patron and Ordinary have no Interest to charge it, but in as much as all who have to intermeddle therein are parties to it, or have given their assent to it, it sufficeth.

Gawdy was of the same opinion, and said, That there is no Land but by some means or other it might be charged, and therefore if Tenant for life grant a Rent-

a Rent-charge in Fee, and he in the Reversion confirm the Grant, per Littleton, the Grant is good in property, so here.

To which Clench also assented, but Popham said, That by the entry for the Condition, the Charge is defeated: And therefore we are to consider upon the ground of Littleton in his Chapter of Confirmation, to what effect a Confirmation shall enure, and this is to bind the right of him who makes the Confirmation, but not to alter the nature of the Estate of him to whom the Confirmation is made; And therefore in the case of a grant of a Rent-charge by the Disfeisor, which is confirmed by the Demisee: the reason why the Confirmation shall make this good, is, because that as the Disfeisor hath right to defeat the right and the Estate of the Disfeisor by his Regresse, in the same manner hath he right thereby to avoid a Charge, or a Lease granted by the Disfeisor, which Right for the time may be bound by his confirmation. But when a man hath an Estate upon condition, although the Feoffor, or his Heirs confirm this Estate, yet by this the Estate is not altered as to the Condition, but it alwaies remaineth, and therefore Nihil operatur by such a confirmation to prejudice the Condition. And so there is a great diversity, when he who confirmeth, hath right to the Land, and where but a Condition in the Land. And by him, if a Feoffor upon condition make a Feoffment over, or a Lease for life or years, every one of these have their Estates subject to the Condition; and therefore by a Confirmation made to them, none can be excluded from the Condition: And the same reason is in case of a Rent granted by a Feoffor upon Condition, it is also subject to the Condition, and therefore not excluded from it by the Confirmation, as it shall be in case of a Right.

And to prove this diversity, suppose there be Grandfather, Father, and Son, the Father disfeise the Grandfather, and makes a Feoffment upon Condition, and dies, after which the Grandfather dies, now the Son confirms the Estate of the Feoffee, by this he hath excluded himself from the Right which descended to him by his Grandfather, but not to the Condition which descended to him from his Father.

And of this opinion were Anderson and other Justices at Serjeants-Inn in Fleetstreet, for the principall Case upon the Case moved there, by Popham this Term: And as the case is, it would have made a good question upon the Statute of Fraudulent Conveyances, if the Abolory had been made as by the grant of Thomas May, in as much as the Estate made to the use of Dennis, was defeasable at the pleasure of the said Thomas, in as much as it was made by the Tenant of the Land, as well as by him who made the Conveyance, which is to be judged fraudulent upon the Statute. But this as the pleading was, cannot come in question in this case: And afterwards by the opinion of other three Judges, Judgment was given that the Grant should bind the said Thomas May, and his Feoffees after him, notwithstanding his regresse made by the Condition, in as much as the Grant of the said Thomas shall enure to the Grantee by way of confirmation.

And by Gawdy, If a Feoffee upon Condition make a Feoffment over, and the first Feoffor confirm the Estate of the last Feoffee, he shall hold the Land discharged of the Condition, because his Feoffment was made absolutely without any Condition expressed in his Feoffment.

But Popham denied this, as it appeareth by Littleton Tit. Descents, because he hath his Estate subject to the same Condition, and in the same manner as his Feoffor hath it, into whomsoever hands it happeneth to come, and therefore the Confirmation shall not discharge the Condition, but is only to bind the right of him who made it in the possession of him to whom it is made but not upon Condition.

Morgans Case.

7. **R**obert Morgan Esquire, being seised in his Demesne as of Fee, of certain Lands called Wanster Tenements in Dorset, having Issue John his eldest Son, Christopher his second Son, and William his youngest Son; by his last Will in writing, demised to the said Christopher and William thus; viz. Joyntly and severally for their lives, so that neither of them shall alienate the Lands, and if they do, that they shall remain to his Heirs. Robert the Father dies, and afterwards John his Son and Heir dies without Issue, the reversion by this descends to the said Christopher who dies, leaving Issue. And upon this Case made in the Court of Wards, the two chief Justices Popham and Anderson agreed first, That upon the devise and death of the Father, the said Christopher and William were Joynt-tenants of the Land, and not Tenants in Common, notwithstanding the word (severally) because it is coupled with the said word (joyntly.) But yet they agreed also, that by the descent from John to Christopher, the Fee-simple was executed in the said Christopher, for the Poerty in the same Anno, as if he had purchased the Reversion of the whole, or of this Poerty, and that it is not like to the Case where Land is given, and to the Heirs of one of them, in which case for the benefit of the Survivorship, it is not executed to divide the Joynture, because the Estates are made at one and the same time together, and therefore not like to the case where the Inheritance cometh to the particular Estate by severall and divided means: And a Decree was made accordingly.

Trin. 36, Eliz. In the Kings Bench.

1. **I**t was agreed by all the Justices and Barons of the Exchequer, upon an Assembly made at Serjeants Inn, after search made for the ancient Customs and Presidents, and upon good deliberation taken.
If a man have two houses, and inhabit sometimes in one, and sometimes in the other, if that House in which he doth not then inhabit be broken in the night, to the intent to steal the Goods then being in his house, that this is Burglary, although no person be then in the House, and that notwithstanding the new Statute made, such an Offender shall not have his Clergy, for before the Statutes were made, which take away Clergy in case of Burglary, where any person was put in fear, no mention was made in the Indictments of Burglary, that any person was in the House: But it was generally that the house of such a one Nocturner fregit, and such Goods then there felonice cepit. And the breaking of a Church in the night to steal the Goods, there is Burglary, although no person be in it, because this is the place to keep the Goods of the Parish. And in the same manner the house of every one is the proper place to preserve his Goods, although no person be there. And that the Law was always, so it is to be collected by the course of the Statutes therof made, for first the Statute of 23 H. 8. doth not take Clergy from any in case of Burglary, unless some of the same Family be in the house, and put in fear. And in 5 Eliz. 6. The Offendor shall be ousted of his Clergy, if any of the Family be in the house, be they sleeping or waking. And these Statutes were the cause that it was used of late time, to put in the Indictments of Burglary, that some person of the Family was then in the house, to put them from their Clergy. But this doth not prove that it shall not be Burglary, but where some person was in the house, and by 18 Eliz. Clergy is taken away in all cases of Burglary generally, without making

making mention of any person to be there, which enforce the resolution aforesaid, and according to it, they all agreed hereafter to put it in Execution.

Finch *versus* Riseley.

2. **I**n this Term the case between Finch and Riseley was in question before all the Justices and Barons for this, assembled at Serjeants-Inn in Fleetstreet, where after Arguments heard by the Councell of the parties upon this point only.

If the Queen make a Lease for years, rendering Rent, with a Proviso, that the Rent be not paid at the day limited, that the Lease shall cease, without making mention that it was to be paid at the receipt, whether the Lease shall cease upon the default of payment, before Office found thereof?

And by Periam and some of the Justices, the Lease shall not cease untill an Office be found of the default, because it is a matter in Fact which determines it, to wit, the non-payment.

And by Gawdy, it shall be taken as if it had been for the non-payment, that the Proviso had been that the Lease shall be forfeited: In which case it is not determined untill Re-entry made for the forfeiture, which in the Queens case ought alwaies to be by Office, which counterbails the re-entry of a common person; As where the Queen makes a Lease, rendering Rent, and for default of payment a Re-entry, albeit the Rent be not paid, yet untill Office found thereof, the Rent continues.

Popham, Anderson, and the greater part of the Justices and Barons resolved that it was clear in this case, that Ipso facto upon the default of payment, the Lease was determined, according to the very purport of the contract, beyond which it cannot have any being, and therefore there needs no Office in the case. But where it is that it shall be forfeited, or that he shall re-enter, there untill advantage taken of the forfeiture in the one case, or untill re-entry made in the other case, the Term alwaies continues by the contract: And where in the case of a common person, there is need of a re-entry to undo the Estate, there in the case of the King there needs an Office to determine the Estate, for an Office in the Kings case counterbails an entry, for the King in person cannot make the entry: And upon this resolution of the greater part of the Justices in Mich. Term 31, & 32 Eliz. the same case was in question in the Office of Pleas in the Exchequer, between the said Moil Finch Plaintiff, and Thomas Throgmorton, and others, Defendants, and there adjudged by Manwood late chief Baron, and all the other Barons unanimously after long argument at the Bar and Bench, that the Lease was void upon default of payment of the Rent according to the Proviso of the Lease, and this immediately without Office for the reasons before remembred; upon which Judgment was given, a Writ of Error was brought before the Lord Keeper of the great Seal, and the Lord Treasurer of England, where it long depended, and after many arguments, the Judgment given in the Exchequer by the advice of Popham and Anderson was affirmed, and that upon this reason, for the Proviso shall be taken to be a limitation to determine the Estate, and not a Condition to undo the Estate, which cannot be defeated in case of a Condition, but by entry in case of a common person, and but by Office (which counterbails an entry) in the case of the Queen. And this Judgment was so affirmed in Mich. Term, 36, & 37 Eliz.

Smiths Case.

3. **I**t was found by Diem clausit extremum, after the death of Richard Smith, that in consideration of a marriage to be had between Margaret Smith, and William Littleton a younger Son to Sir John Littleton Knight,
P and

and of 1300. marks paid by the said Sir John to the said Richard, he made assurance by Fine of his Lands (being 174 l. a year) viz. Of part thereof of the value of 123 l. a year, of which part was holden of the Queen by Knights Service in Capite, to the use of himself for his life, and after his decease to the use of the said William and Margaret, and the Heirs of the body of the said William, begotten on the body of the said Margaret, and for default of such Issue, to the use of the right Heirs of the said William. And of the residue thereof, being also holden in Capite of the Queen, to the use of himself for his life, and after his decease to the use of the first Issue Male of the said Richard, and to the Heirs Males of his body, and then to other Issues of his body, and for default of such Issue, to the said William and Margaret, and the Heirs of the body of the said William, on the body of the said Margaret lawfully begotten, and for default of such Issue, to the right Heirs of the said William, with this proviso, That it shall be lawful for the said Richard, to make a Joynture to his wife of the Lands limited to his Issue Males, and for making of Leases for 21. years, or three lives, for any part of the said Land, rendring the ancient Rent, except of certain parcels, and that William died without Issue, and that Gilbert Littleton was his Brother and Heir, and that the said Margaret married the said George Littleton youngest brother to the said William, which are yet living: And that the said Richard married Dorothy, and made her a Joynture according to the Proviso: And that the said Richard had Issue John Smith, and died, the said John being his Son and Heir, and within age.

After which, a Melius inquirendum issued, by which it was found, that the said Margaret was the Daughter of the said Richard, and that the said Land was of the value of 12000 l. at the time of the assurance: And how much of the Land shall be in ward, and what Land, and what the Melius inquirendum makes in the case, was the question put to the two chief Justices, Popham and Anderson, who agreed, that the Queen now shall have the third part, as well of that which was assured to William and Margaret, immediately after the death of the said Richard, as of that which was limited to Dorothy for the life of the said Margaret, for although money were paid, yet this was not the only consideration why the Lands were assured, but the advancement of the Daughter, and now by the surviving of the said Margaret, shee shall be said to be in the whole, which was assured to her by her Father, and for her advancement, and the Land (as it appears) was of greater value then the money given, and may as well be thought to be given for the Remainder of the Fee. And agreeable to this was the case of Coffin of Devonshire, about the beginning of the Reign of the now Queen, which was that the said Coffin for moneys paid by one Coffin his Cousin (having but Daughters himself) conveyed his Land to the use of himself and his wife, and to the Heirs Males of his body, and for default of such Issue to the use of his said Cousin and his Heirs, for which, his said Cousin was to give a certain sum of money to the Daughters for their marriage: Coffin dies, his said Daughters being his Heirs and within age, and were in ward to the Queen, the Lands being holden by Knights Service in Capite: And the third part of the Land was taken from the wife of Coffin for the life of the said wife, if the Heirs continue so long in Ward.

And it was also agreed by them and the Councell of the Court, that the Melius inquirendum was well awarded, to certifie that the said Margaret was the Daughter of the said Richard, of which the Court could not otherwise well take Conscience, for they thought that it was not matter to come in by the averment of the Attorney generall, as Dyer hath reported it: But now by the Statute, it ought to be found by Inquisition, and being a thing which stands with the former Inquisition, it ought to be supplied by the Melius inquirendum: for the same Statute which gives the Wardship in case where Land

Land is conveyed for the advancement of the Wife, or Infants, or for the satisfaction of Debts and Legacies of the party by the implication of the same Statute, this may be found by Inquisition; and if it be omitted in the Inquisition, it ought to be found by a *Melius inquirendum*, but not to come in by a bare surmise. And therefore if in the Inquisition it be found, that the Ancestor had conveyed his Land by the *Melius inquirendum*, it may be found that it was for the payment of his Debts or Legacies, or that the party to whom, or to whose use it was made, was the Son, or Wife of the party that made it, and that by the very purport of the Statutes 32. & 34 H. 8. as by Fitzherbert, if it be surmised, that the Land is of greater value then it is found, a *Melius inquirendum* shall issue, and so shall it be if it be found that one is Heir of the part of the Mother, but they know not who is Heir of the part of the Father; so if it be not found what Estate the Tenant had, or of whom the Land was holden: so upon surmise made, that he is seised of some other Estate, or that he held it by other Services, by Fitzherbert a *Melius inquirendum* shall issue, and upon this order given, it was decreed accordingly this Term.

Morgan *versus* Tedcastle.

4. **I**n the same Term upon matter of Arbitrement between Morgan and Tedcastle, touching certain Lands at Welburn, in the County of Lincoln, put to Popham, Walmesley, and Ewens Baron of the Exchequer: Whereas Morgan had granted to Tedcastle a 100. acres of Land in such a field, and 60. in such a field, and 20. acres of Meadow in such a Meadow in Welburn and Hanstead, in which the acres are known by estimations or limits, there he shall take the acres as they are known in the same places, be they more or lesse then the Statute, for they passe as they are there known, and not according to the measure by the Statute. But if I have a great Close, containing 20. acres of Land by estimation, which is not 10. And I grant 10. acres of the same Close to another, there he shall have them, according to the measure by the Statute, because the acres of such a Close are not known by parcels, or by meets and bounds, and so it differeth from the first case: And upon the case then put to Anderson, Brian, and Fennor, they were of the same opinion: Quod nota.

Humble *versus* Oliver. or Glover.

5. **I**n Debt by Richard Humble against William Oliver, for a Rent reserved upon a Lease for years, the case was this; Thomas Plain was seised in his Demesne as of Fee, of a Messuage in S. and so seised, did let it to the Defendant for divers years yet to come, rendering Rent, payable at four usuall feasts of the year, the Lessee entred accordingly, after which the said Plain by Bargain and Sale enrolled, conveyed the Reversion therof to the said Humble and his Heirs, and before the feast of the Annunciation of our Lady, 35 Eliz. to wit, the 1. day of February, in the same year the said Oliver assigned over his whole Term to one Southmead, who before the same feast entred accordingly, and for the Rent due at the feast the Annunciation of our Lady, the Plaintiff brought this Action: And it was agreed by the whole Court that the Action would not lie against him; for although Plain (if he had not aliened the Reversion over) might have had this Action against the said Oliver, notwithstanding that he had assigned over his Term before, for the privity of contract which was between them, in as much as they were parties to it of either part, yet the Grantee of the Reversion shall not

Post. 120, 126
3. Co. 23. b.
3. Mod. 226
4. Mod. 71
Carth. 177
1. Shaw. 340.

not have advantage of the priority, he being a meer stranger to the Contract, and now was but priority in Law by the Bargain, and therefore now he hath no remedy but against him who had the Estate at the time when the Rent hapned to be due; and this is Southmead, and not Oliver. The Roll of this case is in the Kings Bench, Hill. 36. Eliz. Rot. 420.

Mich. 36, & 37 Eliz. In the Kings Bench.

Button *versus* Wrightman.

1. **I**n an Ejectione firmæ, between John Button Plaintiff, and Etheldred Wrightman Widow, and other Defendants; for a House and certain Lands in Harrow. The Case upon a speciall Verdict was this; The Dean and Chapter of Christs Church in Oxford, were incorporated by H. H. 8, by his Letters Patents, dated 4. Novemb. 38 H. 8. by the name of the Dean and Chapter of the Cathedral Church of Christ, &c. Oxford, of the Foundation of King Henry the 8th. and so to be called for ever; after which the said Dean and Chapter was seised in their Demesne as of Fee, of the said House and Land, and so being seised by the name of the Dean and Chapter Ecclesie Cathedralis Christi in Accademia Oxon. ex fundatione Reg. H. 8. enfeoffed Edward, late Lord North therof, by their Deed, bearing date the 21. day of April, 1. E. 6. who afterwards dyed, and the now Lord North entred, and did let it to the Plaintiff, who was ousted by the Defendant, claiming the said House by a Lease made by the said Dean and Chapter in the time of Queen Elizabeth, for divers years yet to come, and whether his entry were lawfull, or not, was the question, and all depends upon the mis-naming of the Corporation: But it was found that the City of Oxford, and the University of Oxford were all one, and that the Town of Oxford was made a City by the Charter of King H. 8.

And by Fennor, the feoffment made to Edward Lord North, for the mis-naming of the Corporation, was void, for he said, that Accademia & villa de Oxford, are divers in name, and divers in nature, for the University is to the Schollars and learned men there, and the Town for the Inhabitants, and the name of a place is a principal thing in a Corporation, which in a new Corporation ought to be precise, according to the very Letter of the Charter therof: And therefore, in the case of Chester it was agreed, that Cestria being omitted, the Charter for the Dean and Chapter there had been void.

But by Popham, Gawdy, and Clench, this is not such a mis-naming as to the place which shall make the feoffment void: for suppose it had been Decanus & Capitalis Ecclesie Cathedralis Christi in Civitate Oxon. it had been good, for Oxon. & Civitas Oxon. are one and the same. So it is if an Hospitall be erected by the name of the Hospitall of S. Johns in S. Clements; and they make a Grant by the name of the Hospitall of S. Johns in the Parish of S. Clements, it is good, for it appeareth to be the same: And here if a man will say, that it shall go to the University of Oxford, this every one conceives to be the Town of Oxford, and so of Cambridge, and therefore in 8 H. 6. it was agreed to be a good addition for the place in an Action personall, against such a one Chancello; of the University of Oxford, and so it is against J. Rector of the Parish Church of Dale, without any other addition for the place, yet the Statute is, that it ought to be named of what Town, Hamlet, or place the party is. And by Popham, the place in a Corporation may well be resembled to the Sur-name of a man, and as a Grant made by any persons Christian name, as John, Thomas, &c. is not good, so in a Corporation it is not good to say, Dean, and Chapter, Mayor, and Comminalty, and the like, without

without saying, of what place: And anciently men took most commonly their Surnames from their places of habitation, especially men of Estate, and Artizans often took their names from their Arts, but yet the Law is not so precise in the case of Surnames, and therfore a Grant made by, or to John, Son and Heir of I. C. or Filio juniore I. S. is good: But for the Christian name, this alwaies ought to be perfect.

So in the case of a Corporation, it sufficeth to have a sufficient demonstration of the place where the Corporation is, albeit it be not by the precise words comprised in the Charter: as in naming Accademia Oxon. pro Villa Oxon, and it is common, of which I have seen divers Charters, where a Town was incorporated by the name of Mayor, and Comminalty of such a Town, as Bristol, Exeter, and others, which afterwards have been made Cities, and yet Charters made to them, and Grants made by them, by the name of Mayor and Comminalty of the City is good, but more precisenesse is used in the body of the name of a Corporation before the place to which they are annexed, and yet in them, that which is but an ornament to the name comprehended in the Charter, shall not hurt the Grant, as of Chapter, of S. George of Windsor, if it be of S. George the Martyr, and the like, the Grant by such a name is good, because the Martyr is but an addition of Ornament to the name comprised in the Charter, and it is no other but the same in re vera. So here, if it had been Domini nostri Jesu Christi, because it is the same, and is but an ornament to the word Christ comprised in the Charter, and so should it be also if it had been Christi filii Dei Salvatoris nostri, because it is but a true addition to the same; whereupon Judgment was given for the Plaintiff, as appeareth in the Kings Bench, Pas. 35 E. Rot. 258.

And Popham said further in this case, that to erect an Hospitall by the name of an Hospitall, in the County of S. or in the Bishoprick of B. and the like, is not good, because he is bound to a place too large, and incertain: But a Colledge erected in Accademia Cantabrig. or Oxon. is good, and some are so founded because it tends but to a particular place, as a City, Town, &c.

King *versus* Bery and Palmer.

2. **I**n an Ejectione firmæ, brought by William King against John Bery and William Palmer Defendants, for two Messuages and certain Lands in Halstead in the County of Leicester, upon a Demise alledged to be made by Dorothy Pool, and Robert Smith, the case upon a speciall Verdict was this; The said Dorothy was Tenant for life of the said Tenants, the Remainder over to the said Robert Smith and his Heirs, and they being so seised made the Lease in the Declaration, upon which the Action was brought. And per curiam, the Lease found by the Verdict doth not warrant the Lease alledged in the Declaration; for although they joyned in the Demise, yet during the life of the said Dorothy it is her Demise, and not the Demise of the said Robert Smith; but as his confirmation for that time: for he hath nothing to do to meddle with the Land during the life of the said Dorothy, but after the death of the said Dorothy then it shall be said to be the Demise of the said Robert Smith, and not before, because untill this time Smith hath nothing to do to meddle with the Land. And in a more strong case, If Tenant for life, and he in the Reversion in Fee make a Gift in tail, for the life of Tenant for life, it shall be said to be his Gift, but after his death it shall be said the Gift of him in the Reversion, and if the Estate tail had expired during the life of the said Tenant for life, he shall have the Land again in his former Estate, and there shall be no forfeiture in the case, because he in the Reversion of the immediate Estate of Inheritance had joyned in it, and therefore hath dispensed with that which otherwise had been a meer forfeiture of the Estate for life, whereby it was awarded by the Court that the Plaintiff take nothing by his Bill in 33. & 34 Eliz. Rot. And the Judgment is entred, Hill. 34. Eliz. Rot. 72.

3. In this Term I hapned to see a Case agreed by the Iustices in 3. & 4. Eliz. which was this :

If a man make a Lease of two Barns, rendring Rent, and for default of payment, a Re-entry, if the Tenant be at one of the Barns to pay the Rent, and the Lessor at the other to demand the Rent, and none be there to pay it, that yet the Lessor cannot enter for the Condition broken, because there was no default in the Tenant, he being at one, for it was not possible for him to be at both places together.

And upon this Case now remembred to the Iustices, Popham, Walmesley, and Fennor said, That perhaps also the Tenant had not money sufficient to have been ready to have paid it, at either of the said places, but it is sufficient for him to have and provide one Rent, which cannot be at two places together.

And by the Case reported here also ; If Lands and Woods are demised together, the Rent ought to be demanded at the Land, and not the Wood, because the Land is the more worthy thing, and also more open then the Wood : And therfore by the three Iustices aforesaid, Rent ought not to be demanded in any private place of a Close, as amongst Bushes, in a Pit, or the like, nor in the open and most usuall passage therof, as at a stile, Gate, and the like.

4. Upon a Prohibition sued out of the Kings Bench, the Case appeared to be this.

The late Lord Rich, Father to the now Lord Rich devised, to his Daughter, for her advancement in marriage 1500. upon condition, that she marry with the consent of certain friends, and deviseth further, that if his Goods and Chattels are not sufficient to pay his Debts and Legacies, that then there shall be 200 l. a year of his Lands sold to supply it, and dies, making the now Lord Rich his Executor, his Goods and Chattels not being sufficient to pay the Debts of the Testator, as was averred, the said Daughter married with a Husband against the will of those who were put in trust to give their assents; and the Husband and the Wife sued in the Spirituall Court for the Legacy : And it was surmised that they would not allow the proofs of the said now Lord Rich, exhibited to prove the payment of the Debts of his Testator ; and further, that they would charge him for the sale of the Land ; upon which matter the Prohibition was granted to the Delegates, before whom the matter depended, and now consultation was prayed in the case.

Upon which it was affirmed by a Doctor of the Civill Law, that they will allow the proofs for the payment of the Debts, according to our Law, and that the Legacy shall not be paid untill the Debts are satisfied. But he said, that by the Law, if the Executor do not exhibit his Inventory, but neglect it for a year, or more, that then if any omission or default be in the true value of the Inventory exhibited, that then such an Executor for this default shall pay all the Legacies of his Testator, of what value soever they are, not respecting the Debts, or the value of the Goods or Chattels, how small soever the omission, or default be in the Inventory ; And so he said was the case of the now Sir Richard S. who did not bring in the Inventory for four years after the death of the Testator, and that in the Inventory exhibited, the values of every thing were found to be too small, and therfore to be charged by their Law, albeit he hath not Goods and Chattels sufficient of the Testators : To which it was answered, that this was quite without reason, for by such means every Subject of the Realm may be utterly defeated, if he take upon him the charge of an Executorship : And if this shall be admitted, no man will take upon him the Execution of the Will of any, and by such a means none will have their Wills performed, which shall be too inconvenient

nient. And they said further, that in as much as Debts are to be proved by the Common Law of the Realm, those of the Ecclesiasticall Courts ought to admit in the proof thereof, such proofs as our Law allows, and not according to the precisenesse of their Law: And although by their Law such a Condition as befoze being annexed to a Legacy, is void, because that marriage ought to be free without Coercion, yet where we are to judge upon the point (as we are here) if the Execution happen to be charged because of the sale of Land, and for the money coming thereof, a prohibition shall be granted to the Ecclesiasticall Judge in such a case, whereby the Court granted a speciall consultation in the Case, to wit, that they proceed for the Legacy, provided, that they charge the Executor no further then he hath in Goods and Chattels of the Testator, after his true and due Debts are satisfied: And that in the case of the proof of these Debts, they allow such proofs as by the Law of the Land are holden to be sufficient in such a case; Quod nota bene, as to the restraining of Ecclesiasticall Courts in their proceedings, to bind any subject touching his private temporall Estate, against all reason: And as to it, that they do not intermeddle in any thing belonging to the Common Law of the Realm, as Debts, and the like, against the due course of the Common Law.

Cawdry *versus* Atton.

5. **I**n Trespasse brought by Robert Cawdry Clerk, against George Atton, *Vide this Case*
for breaking his Close at North Luffenham in the County of Rutland, *Co. lib. 5. 1. pa.*
upon not guilty, and a speciall Verdict, the Case appeared to be this, to wit, that the Plaintiff was Rector Ecclesiae de North Luffenham aforesaid, of which the place was parcell, and being so seised, was deprived of his Rectory by the late Bishop of London and his Colleagues, by virtue of the high Commission to them and others directed, because he had pronounced and uttered slanderous and contumelious words against, and in deprecation of the Book of Common-prayer; But the form of the sentence was, that the said Bishop by, and with the assent and consent of five others, &c. the said Commissioners his Companions, and namely which deprived him.

And further, it was not found, that the Commissioners named were the naturall Subjects born of the Queen, as the Statute enacts that they should be: And if the deprivation be void, then they find the Defendant guilty, and if it were good, then they find him not guilty. And it was moved that the deprivation was void.

First, Because that whereas the Commission is to them, or any three of them, of which the said Bishop to be one amongst others, it ought to have been the sentence of them all, according to the authority given to them, which is equal, and not that it was done by one with assent of the other. Then because it is not found that the Commissioners are the naturall Subjects of the Queen born, as by the words of the Statute they should be.

Another is, because the punishment which the Statute provides for those of the Ministry which deprave this Book, is to loose the profits of all their Spirituall Promotions but for a year, and to be imprisoned by the space of six months, and not to be deprived until the second Offence, after that he had been once committed, and therefore to deprive him for the first offence was wrongfull and contrary to the Statute. But by the whole Court for the form of the deprivation, it is, that which is used in the Ecclesiasticall Courts, which alway names the chief in Commission, that are present at the beginning of the Sentence, and for the other they mention them only as here, but of their assent and consent to it, and in such cases we ought to give credit to their form, and therefore tis not to be compared to an authority given at Common Law by Commission.

And

And for the matter that is not found, that the Commissioners were the naturall Subjects of the Queen boyn, it is to be intended that they were such, unlesse the contrary appear: But here at the beginning it is found that the Queen, secundum tenorem & effectum actus predict. had granted her Commission to them in causis Ecclesiasticis, and therfore it appeareth sufficient, ly that they were such as the Statute wills them to be.

And for the deprivation, they all agreed that it was good, being done by the authority of the Commission, for the Statute is to be understood where they prosecute upon the Statute by way of Inditement, and not to restrain the Ecclesiasticall Jurisdiction, being also but in the Affirmative.

And further by the Act and their Commission, they may proceed according to their discretion to punish the offence proved or confessed before them, and so are the words of their Commission warranted by the clause of the Act.

And further, the Ecclesiasticall Jurisdiction is saved in the Act.

And further, all the Bishops and Popish Priests were deprived by virtue of a Commission warranted by this clause in the Act: And now lately it was agreed by all the Justices, that a Fine of 200. marks set upon one for a bitious liber by the high commission was warranted by virtue of the Commission and Act: And therfore if the Act with the Commission, are to be considered in this case, wherupon it was agreed that the Plaintiff should take nothing by his writ: Which you may see, Hill. 33. Eliz. Rot. 315.

Hall *versus* Peart.

6. **I**n an Ejectione firmæ brought by William Hall Plaintiff, for Land in D. in the County of Somerset, upon a Lease made by William Dodington against John Peart and other Defendants, upon a speciall Verdict the case appeared to be this.

Vide this case in Cook lib. 2 32, 33. by the name of Dodingtons case.

That one John Brown was in possession of certain Lands in D. aforesaid, which before were parcel of the possessions of the Hospitall or Priory of S. Johns in Wells, the Inheritance thereof then being in the late King H. 8. by the Act of dissolutions: And the King being so seised by his Letters Patents, dated 26. of March, 30 H. 8. ex gratia speciali, certa scientia & mero motu suo, granted to John Ayleworth, and Ralph Duckenfield, omnia illa Messuagia Ter. Tenemt. & gardina sua & quæcunque sunt in separabilibus tenuris diversarum personarum, which he named particularly, amongst which the said John Brown was one in Civitate Wellen. ac in suburbis ejusdem Civitat. & extra eandem civitat. within the Jurisdictions and Liberties of the said City, late parcell of the possessions of the said Hospitall, and that the said John Brown had not then any other Lands late parcell of the possessions of the said Hospitall, but this in D. and that this Land was quite out of the said City of Wells, and of the Suburbs thereof, and also out of the Liberties and Jurisdiction of the said City, and yet it was found that it was in the particular and parcell of the value, and valued in it in the Tenure of the said John Brown at 6 s. 8 d. a year, and the grant was to the said John Ayleworth and Ralph Duckenfield, and to the Heirs of the said John Ayleworth for ever.

And it was moved that the Grant was good to the said Ayleworth and Duckenfield, because of the Statute of non-recitall and mis-recitall, because it appeareth by the particular, and value that it was intended to be passed: And if this doth not passe, nothing can passe which was in the Tenure of the said Brown, because he had nothing in the places comprised in the Patent.

But it was agreed by all the Court, that it shall not passe by the said Patent in this case, for the word (illa) is to be restrained by that which follows in the Patent, where it depends upon a generality, as here, and that it refers but to that in Wells, as the liberty of that which was parcell of the possessions

sessions of the said Hospitall, and in the Tenure of the said John Brown: And if it were not of these possessions, or not in Wells, &c. or not in the Tenure of the said John Brown, it shall not passe, for the intent of the King in this case shall not be wrested according to the particular or the value, which are things collaterall to the Patent, but according to his intent comprised in, or to be collected by the Patent it self.

And Popham said, that by Grant of omnia, terras Tenementa & Hereditamenta sua in case of the Queen nothing passe, if it be not restrained to a certainty, as in such a Town, or late parcell of the Possessions of such a one, or of such an Abbey, or the like, in which cases it passeth, as appeareth by 32 H.8. in case of the King: But if it be Omnia, terras & tenementa sua vocat. D. in the Tenure of such a one and in such a Town, and late parcell of the possessions of such a one, there albeit the Town or the Tenant of the Land be utterly mistaken, or that it be mistaken of what possessions it was, it is good, for it sufficeth that the thing be well and fully named, and the other mistakes shall not hurt the Patent.

And the word of Ex certa scientia, &c. will not help the Patent in the principall case. And the case of 29 E. 3. is not to be compared to this case, for it was thus.

The King granted the Advowson of the Priory of Mountague (the Prior being an Alien) to the Earl of Salisbury and his Heirs for ever: And also the keeping and Farm with all the Appurtenances and Profits of the said Priory, which he himself had curing the War, with the keeping of certain Cells belonging to the said Priory; the said Earl died, William Earl of Salisbury being his Son and Heir, and within age, whe upon the King reciting that he had seised the Earls Lands into his hands after his death, for the Nonage of the Heir, he granted to the said Earl all his Advowsons of all the Churches which were his Fathers, and all the Advowsons of the Churches which belong to the Prior of Mountague, to hold untill the full age of the said Heir, & *quas nuper concessit prefat. Comiti patri, &c.* In which case, although the King had not granted the Advowsons to the said Earl the Father aforesaid, by the former Patent, because no mention was of the Advowsons thereof, yet they passe by this Patent, notwithstanding that which follows after, to wit, and which he granted to the Father of the Grantee: But there it is by a Sentence distinct, and not fully depending upon the former words, as here, to wit, *Omnia illa Messuagia, &c.* in Wells, in the Tenure of the party, parcell of the Possessions of such an Hospitall, or Priory: *Quod nota*, and the difference.

And because the Defendant claimed under the first Patent, and the Plaintiff by the latter Patent, it was agreed, that the Plaintiff should recover: Which you may see in the Kings Bench.

Harrey *versus* Farcy.

7. **I**n an Ejectione firmæ brought by Richard Harrey Plaintiff, for the Recovery of certain Tenements in North-petherton, in the County of Somerset, upon a Lease made by Robert Bret against Humfrey Farcy Defendant, upon not guilty, and a speciall Verdict found, the case appeared to be this, to wit, That Robert Mallet Esquire, was seised of the said Tenements, in his Demesne as of Fee, and so seised demised them to John Clark, and Elianor Middleton, for term of their lives, and of the longer liver of them, after which the said Tenements (amongst others) were assured by Fine to certain persons and their Heirs, to the use of the said Robert Mallet for term of his life, and after his decease to the use of John Mallet his Son and Heir of his body, and for default of such Fine, to the use of the right Heirs of the said Robert Mallet.

After which the said Robert Mallet (having Issue the said John Mallet, Christian, and Elianor Mallet) died, the said John Mallet then being within age, and upon Office found in the County of Devon, for other Lands holden of the Queen in Capite by Knights Service was for it in Ward to the Queen: Afterwards the said John Mallet died without Issue during his Marriage, and the Lands aforesaid thereby descended to his said two Sisters, to whom also descended other Lands in the County of Devon, holden of the Queen in Capite by Knights Service, conveyed also by the same Fine in like manner, as the Lands in North Petherton, the said Christian then being of the age of 22 years, and the said Elianor of the age of 15 years, upon which the said Christian and Elianor, 12. Novemb. 31 Eliz. tendered their Livery before the Master of the Wards, and before the Livery sued, the said Christian took the said Robert Bret to husband, and the said Elianor took to husband one Arthur Ackland; after which in the Week of the Purification of our Lady, 32 Eliz. the said Robert Bret and Christian his wife, levied a Fine of the said Tenements in North-petherton, amongst others to George Bret and John Pecksey, Sur consance de droit come ceo que ils ont de leur done, by the name of the Warranty of the Pannor of North petherton, &c. with warranty against them and the Heirs of the said Christian against all men, who tendered it by the same Fine to the said Robert Bret and Christian, and the Heirs Males of their bodies, the remainder to the Heirs Males of the body of the said Christian, the remainder over to the right Heirs of the said Robert Bret, which Fine was engrossed the same Term of St. Hillary, and the first Proclamation was made the 12th. day of February in the same Term; the second, the first day of June in Easter Term, 32 Eliz. The third, the 8th. day of July in Trinity Term next: And the fourth Proclamation was made the 4th. day of October, in Michaelmas Term next after. And the said Christian died without Issue of her body. The 9th. day of February, 32 Eliz. between the hours of 3. & 7. in the afternoon of the same day. And the 22. of March, 32 Eliz. the said Robert Bret by his writing indentured, dated the same day and year, for a certain sum of money to him paid, by the Queen, bargained and sold, gave and granted the said Tenements to the said Queen, her Heirs and Successors for ever, which Deed was acknowledged the 25th. day of March, 32 Eliz. and enrolled in the Chancery the 12th. day of May, in the same year: And there was a Proviso in the same Deed, that if the said Robert Bret shall pay to the Queen at the receipt of the Exchequer 5 s. of lawful money, that then the said Gift, Grant, Bargain, and Sale shall be void, and that from thence-foorthward it shall be lawful for the said Robert Bret and his Heirs to re-enter into the said Tenements, and in the mean time between the Inrolment of this Deed: And the said 14th. day of October, to wit, the 15th. day of September, 32 Eliz. the said Arthur upon the said Tenements in North-petherton, entered and claimed the Reversion thereof in the right of the said Elianor his wife, by reason of the death of the said Christian: And that afterwards, to wit, the 30th. day of February, 33 Eliz. the said Robert Bret to redeem the said Tenements out of the Queen, paid the said 5 s. at the receipt of the Exchequer, which payment is there received, and enrolled accordingly; after which in September, 34 Eliz. the said Arthur and Elianor sued out a speciall Livery of the said Elianor, out of the hands of the Queen, of all the Lands seized into the hands of the Queen by reason of the Marriage of the said John Mallet. And afterwards in the same month of September, 34 Eliz. the said Arthur and Elianor sued out another speciall Livery, as Heir to the said Christian, of all the Lands which were in the Queens hands by the death of the said Christian.

And it was further found, that the said John Clark and Elianor Middleton, died after the 5 s. paid as before, and that the said Robert Bret entered the 8th. day of October, 34 Eliz. and then made the Lease to the Plaintiff, upon which

which the Defendant by commandment of the said Arthur, and with him entered upon the Plaintiff; and the generall question was, Whether the entry of the Defendant were lawfull? But no ouster of the Plaintiff was found.

And by Clench, and Fennor, a Fee-simple passe at Common Law by a Fine levied by him in Reversion, or Remainder in Tail, because a Fine is said to be a Feoffment of Record, and by their entry and Feoffment a Fee-simple passe in such a case at Common Law.

But by Popham, and Gandy, a Fee-simple doth not passe, nor nothing but that which Tenant in Tail may lawfully grant over, which is for his life, in which he said, that Littleton was plain in all cases of Grant, although it be by Fine, and a Fee-simple does not passe at Common Law, but where the Fee may be drawn out of him who had the Reversion or Remainder in Fee thereupon, if such a Reversion or Remainder had been in a stranger, which had not been in this case, if the Reversion or Remainder had been in a stranger; and therefore a Discontinuance cannot be of an Intail where the Reversion or Remainder is in the King.

But by them all, however it was at Common Law, it is cleer upon the Statute of Fines, that a Fee-simple determinable passe by such a Fine as soon as the Fine is levied, because every Fine by presumption of Law shall be taken to be such wherupon proclamation is made, untill the contrary thereof appeareth to the Court.

And this is the reason why a Quid juris clamat is at this day maintained upon such a Fine, which was not at Common Law before this Statute, or otherwise it will never lye. And so it was holden lately in the Common Bench, in the case of Justice Wimondham, and yet we may see that the Quid juris clamat ought to be brought before that the Fine be engrossed, wherby it is manifest that now a Fee-simple shall passe by the Fine levied, for the possibility of the Proclamations, to wit, that the Proclamations shall not be made, and to this Fee-simple the Proclamations shall enure to make a bar to the Estate-tail: But such a Fine by Popham and Gawdy was not any wrong to him who had the Reversion or Remainder in Fee being levied by him who had a mean Reversion or Remainder in Tail, depending upon an Estate for life, or in Tail precedent.

And it is cleer, that the Proclamations do not make the Estate, but enure to the Estate made by the Fine, for if an Estate be granted in Reversion for life, or in Tail by Fine, with Proclamations by such a Tenant in Tail, in Reversion or Remainder, the Proclamations work to this Estate, and no further, for alwaies the Estate passe by the Fine, and the Proclamations make the Bar according to the Estate, which passe by the Fine before.

But by Clench, Gawdy, and Fennor, the Fee-simple which was in the Queen after the Fine levied as before, was divested by means of this claim made upon the possession of the Queen, so that the Proclamations following are of no force to hurt the Estate tail, for they said, in divers cases a possessor may be divested out of the Queen without Office, Petition, or Monstrans de droit, as the case is, where a man devise that his Land shall be sold, and in the mean time before the sale, the possession of the Land cometh to the Queen, and afterwards the Land is sold according to the Will, the Vendee enter, there the Land passe from the Queen thereby, and is divested, and so in many other cases. And in all cases where the Queens Estate is determined, the Subject may enter into the Land without Office, or Ouster le main, &c. And they said, if it had been in the possession of a common person, that by such a claim the force of the Fine had been defeated; and this appeareth by the case between Smith and Stapleton in the Commentaries, where it is holden that where a Fine is levied with Proclamations by Tenant in Tail of an Abbotsen, Kent, or Liches, by claim made by the Issue in Tail, before the Proclamations are passed, where the Tenant in Tail is dead, the same

same is defeated, and that the Proclamations passing afterwards, shall not be of force to bar the Intail.

And they said, that the conveyance thereof to the Queen after the Fine levied, doth not make it to be in worse case; And admit it will not serve against the Queen, yet the claim will serve against Bret, when he had entered by the performance of the Condition.

And Clench and Gawdy said, that Bret shall not take advantage of this covinous Deed made by himself, of very purpose to bar the party who had right, and to put him without remedy, no more then where the Disseisor enfeoff his Father who dies seised, he shall not take advantage of this descent, or if he who hath cause of Action to recover Lands by Covin, causeth another to enter into the Lands, to the intent to recover against him, and does it accordingly for the Covin, the Recovery shall be avoided, and in the same manner here.

But Popham took a diversity, where the Possession or the Estate of the Queen is determined, and where not, for where the Estate is determined, there the Subject may enter into the Land without Office, or ouster le main: But where the Possession continues, there the party shall not come to it, unlesse by petition, Monstrans de droit officio, or the like, and therefore he said, that if the Queen had an Estate pur autre vie, or depending upon any other Limitation, if it be determined according to the Limitation, the party who hath interest may enter; so in the case of the Devise put before.

And if a Lease be made for life, the Remainder in Tail, the Reversion in Fee, and he in the Remainder in Tail levy a Fine, Sur consueance de droit come ceo que il ad de son done to a stranger, with proclamations according to the Statute, and afterwards the stranger convey the Remainder to the Queen, her Heirs and Successors, and after the Tenant for life dies, and after he in the Remainder in tail dies without Issue, now may he in the Remainder in Fee enter, because the Estate of the Queen is determined: But here the Queen hath a Fee-simple in her self but determinable upon the Estate-tail which yet remaineth, which Fee-simple in Reversion cannot be divested out of the possession of the Queen but by matter of Record, of so high nature as it is in her, to wit, by Petition, Monstrans de droit, or the like: As if a Reversion or Remainder be alienated in Mortmain, the claim of the Lord sufficeth there to vest the Reversion in the Lord for the Alienation, but if the Reversion or Remainder of which such a claim was made be conveyed to the King, his remedy is now by Office, Monstrans de droit, or Petition, for claim will not now serve him, for this shall be to divest the possession out of the Queen, which by such means cannot be done no more then where a Reversion or Remainder is granted to the Queen upon Condition, but he ought to have an Office to find the performance of it, if it be to be performed by matter in pais, and without Monstrans de droit, or otherwise it shall not be divested out of the Queens possession, yet in the case of a common person, a claim will divest it out of them, but not so of the Queen.

And these cases Gawdy agreed; but he conceived that in the case in question, the claim made determines the Estate of the Queen, which is made by means of the Fine upon the Statute.

And Popham denied the case put in 7 H. 6. to be Law, as it is put upon the opinion of Strange there, for it is clear, that the claim there does not divest any possession which was in the King by means of the Wardship, and if this be not thereby defeated, the claim does not help the Disseisor against the Descent; and this appeareth fully by Littleton, who saith so of a Claim which avoids a Descent, to wit, that it ought to be such upon which the Disseisor may upon every such Claim made have an Action of Trespasse, or Assise against the Disseisor, or him who is in possession, if he continue his possession after such Claim made, which cannot be in this case where the possession

session is in the King, which cannot be defeated by such a Claim. And in the Lord Dyer where the Feoffee, or Mortgagee of Lands holden of the Queen in Capite by Knights Service, died before the day of Redemption, his Heir being within age, whereby upon Office found, the Queen had the Wardship of the body and land of the Heir, after which the Mortgagee at the day of redemption made payment, and of this also an Office was found, yet he could not enter either before or after Office, but upon Monstrans de droit thereupon he had his Ouster le main: And the reason why a Claim shall serve in this case between common persons, is, because that by such Claim the thing it self is divested out of him who had it before, and thereby actually vested in him who made the claim: As where a Willain purchase a Reversion by the Claim of the Lord, the Reversion is actually in him, as it is of a Possession by Entry: But where he is put to his Claim to divest any thing out of a common person, he is put to his Suit to divest it out of the Queen.

And to say, that Bret should not take advantage of this Conveyance made, to make it good by the Fine.

I think the Law to be clear otherwise as to this point, for the Statute of Fines was made for the security of Purchasers and Possessors of Land, and therefore taken more strongly against them who pretend Right or Title, and for the greatest advantage that may be for the Possessors of Lands, and therefore the Possessor by what ever means he can, may make his Fine to be forceable: And therefore the Fine upon this Statute differeth much from a Fine at Common Law; for where at Common Law an Infant being a Disseisor was disseised by one who levies a Fine, and the year and the day passe without claim of the first Disseisee, now was the first Disseisee barred: yet if afterwards the Infant (who was not bound by the Fine) enter, the first Disseisee may enter upon him, because that by this entry the Fine at Common Law was utterly defeated.

But now by the Statute, such a Fine being levied with Proclamations, the first Disseisee not pursuing according to the Statute, is barred forever.

And although the Infant enter at full age, and undoes the Fine as to himself, yet this Fine remains alwaies to bar the first Disseisee, and makes that the Infant hath now Right against all the world, and so now takes advantage thereof: And this is the intent of the Statute for the repose of Controversies and Suits, and the quiet of the people.

And if I procure a Fine to be levied on purpose to bar another of his Action, which he may have against me for the Land, yet I shall take advantage of this Fine, and the other shall have no advantage against me, because of this Covin, for if this should be admitted, it will countervail the benefit which is intended to be by means of the Statute of Fines.

And if a Disseisor enfeoffe another upon Condition, to the intent that a Fine with Proclamations shall be levied to the Feoffee to bar the Disseisee, and after the Disseisee is barred, the Disseisor enter for the Condition, he shall yet take advantage of the Fine against the Disseisee.

And Popham put a case which was in this Court, 23 Eliz upon a speciall Verdict which was between Oke Plaintiff, upon the Demise of John late Lord Sturton of Cottingham which was this.

The Lord Sturton was Tenant for life of certain Lands in Lighe in the County of Somerset, the remainder in Tail to Charles late Lord Sturton, Father to the said John Lord Sturton; and the said Charles Lord Sturton, disseised the said Lady Sturton, and levied a Fine of the said Land to Cottingham and his Heirs, with Proclamations according to the Statute, and warranted it against him, and his Heirs.

And the said Lord Charles dyed before the Proclamations past, and the Warrantie descended upon the said John Lord Starton, after which, and before the Proclamations past, the said Lady Starton entred upon the said Cottington, after which the said Lady died, and after her death and all the Proclamations past, the said John Lord Starton as Heir in Tail entred, and made the Lease to the said Okes, upon whom Cottington the Defendant entred, as under the right of the said Cottington the Comtee. And I perceiveing the Court strongly to incline upon the matter of Warrantie, that it shall bar the entry of the Heir, and make a discontinuance against him, according to the inference which is taken by Littleton in his Chapter of Discontinuance, because the truth was, and so acknowledged to the Court (although it were omitted in the Verdict) that the said Charles Lord Starton, was attainted of Felony and Murder, and so the blood corrupted between the said Charles and John Lord Starton, whereby in a new Action the Warranty had not hurt the Title of the said Lord John.

I then moved the Court upon the other point of the Fine with Proclamations; and the Court also agreed in this point, if the Warrantie had not been, that yet the Fine with Proclamations shall bar the said John Lord Starton, notwithstanding the entry made by the Lady Starton were before the Proclamations past, because that notwithstanding his regresse made, the Reversion remains in Cottington not defeated by his regresse, in respect of the Statute which makes that the Fine remains effectuall against the Heir in Tail, if nothing be done by him to undo it before the Proclamations past as by claim, regresse, and the like; but the Act of a stranger shall not help him, whereby Judgment being therupon given against the said Okes, the said John Lord Starton stood satisfied, and the Cottingtons enjoy the Land to this day; whereas, if this opinion of the Court had not been on a new Action, the said Sir John might have been relieved against the Warrantie.

And Gaudy said, that this was a very good Case for the point upon the Statute in this case.

Earl of Shrewsbury *versus* Sir Thomas Stanhop.

Gilbert Earle
of Shrewsbury,
against Sir
Thomas Stan-
hop in a Scan-
dalum Magna-
rum.

8. **G**ilbert Earle of Shrewsbury brought a Scandalum Magnatum against Sir Thomas Stanhop Knight, and it was upon the Statute Tam pro Domina Regina quam pro seipso, &c. For that communication was had between the said Sir Thomas, and one Francis Fletcher, of divers things touching the said Earle, the said Francis at such a day and place, said to the said Thomas,

My Lord (the said Earle meaning) is a Subject (innuendo) that the said Earle was a Subject of the now Queen) the said Sir Thomas then and there said of the said Earle these slanderous words, to wit, he (intending the said Earle) is sorry for that (meaning that the said Earle was sorry that he was then a Subject to our said Sovereign Lady the Queen) that is his grief (meaning that it was grief to the said Earle, that the said Earle was Subject to the Queen) to the damage of the said Earle of 20000l. To which the said Sir Thomas Stanhop said, that a question was formerly moved between the said Earle and the Defendant, touching the subversion and drawing away of certain Weares heretofore erected by the said Sir Thomas at Whelford, in the said County of Leicestershire, where the Action was brought to oust the River of Trent there, & that for the subversion thereof a Petition was exhibited to the privy Councell of the Queen, before the speaking of the said words, by certain Inhabitants of the County of Lincoln, and divers other places not known to the Defendant, with the privy allowance and knowledge of the said Earle, which Petition at the time of the speaking of the said words, depended before the said Councell not determined, wherupon at the day and place comprised in the Declaration,

on, there was Communication between the said Defendant and the said Francis Fletcher concerning their purpose to have the said Wears subverted, and touching the said Petition, upon which the said Francis said to the said Defendant, the matter (meaning the Petition aforesaid, hanging undetermined before the Councell aforesaid) is to be heard before the privy Councel (meaning the aforesaid Councell of the Queen) and what their Honours (meaning the Councell aforesaid) determine my Lord (the aforesaid Earl meaning) will willingly obey: To which the said Francis then there answered saying, My Lord (the aforesaid Earl meaning) is a Subject, upon which the said Defendant (they then having speech as well of the said Petition, as of the order thereupon to be taken by the said Councell) answered saying, the words comprised in the Declaration, meaning that he was sorry, and grieved that he was subject to the order to be made upon the Petition aforesaid by the said Councell, and averred that this was the same speech upon which the Action was grounded: upon which it was demurred in Law, and for cause shewn according to the Statute it was alledged that the bar was defective, because it is not alledged at what place, nor by whom, nor against whom the Petition was exhibited; and also because that by the Bar the matter of the Declaration is not confessed, avoided, or traversed, and also that the Bar was insufficient: And it seemed to Jfennoz, that the matter of the Bar had been sufficient if it had been well pleaded: but the Plaintiff alledgeth the words to be spoken in one sence in the Affirmative, and the Defendant shews matter also in the Affirmative which proves the words to be spoken in another sence then the Declaration imports, and two Affirmatives can never make a good Issue, and therefore the Defendant ought to have taken a traverse to that which is comprised in the Declaration, and for want of this traverse the plea in Bar is not good.

Gawdy said, that the Bar is not sufficient neither in matter nor form; not in matter, because that whereas Fletcher said, that the said Earl was a Subject, this can have no other sence, but that he was a Subject to the Queen in his Allegiance and her Sovereignty, and so much is drawn out of the course of their former speech, and therefore the answer which the Defendant made to it refers to his subjection of alleagiance, and not to the matter of obedience, which he owed to the order of the said Councell, and if it cannot have any other sence in good understanding, he cannot help himself now by an *Immunudo*, which is in it self according to common intendment, contrary to that which the nature of the words in themselves do purport: And if it had been good for the matter, yet it is not good for the form, for want of a Traverse, for without the Traverse the plea is not answered in that case which is laid to the charge of the Defendant.

But Bopham and Cletch held strongly to the contrary, and that this Bar is good in matter, and (as the case is) cannot be otherwise, and that the form also is good enough, and yet the two Affirmatives cannot make a good Issue: but in case of two Affirmatives, a Traverse shall not be, but where the Affirmatives do not agree in one. As if the Defendant in Trespass Incloses himself by the Feoffment of a stranger, and the Plaintiff reply, and maintain that the same stranger did enfeof him, this cannot make a good Issue without a Traverse of the Feoffment alledged to be made to the Defendant.

But in the same case if the Plaintiff saith, that true it is, that the stranger enfeofed the Defendant, but this was to the use of the Plaintiff and his Heirs, there no Traverse shall be on the Plaintiffs part, because as to the matter of the Feoffment it agrees with the Defendant, in which case it shall not take any Traverse, but there the Traverse shall come on the Defendants part to maintain the Feoffment to his own use, *Abique hoc*, that the Feoffment was to the use of the Plaintiff, for now that which the Defendant saith, (albeit

(albeit it be in the Affirmative) yet it is a Traverse to that which the Plaintiff hath alledged, and therefore he needs not traverse the plea: And so a diversity where the Affirmative is, to traverse that which is alledged by the other party, and where not, for in one case the conclusion shall be with a Traverse, and in the other not: Then in this case when the Plaintiff alledged that the Defendant spake these words, which *prima facie* shall be intended to be spoken in this sence, as the Plaintiff hath alledged, although no *Innuendo* had been in the case, for if it shall not be so intended without the *Innuendo*, the *Innuendo* will not help it, yet when the Defendant hath declared the circumstance wherupon these words were spoken, and then the speaking of them therupon, now he hath confessed the very words themselves to be spoken, but upon the circumstance discovered to be in another sence then *prima facie*, they are to be taken, and therefore he shall not take a Traverse, for he acknowledgeth the very words, but not the intendment which the very Law *prima facie* presumes upon the words, and therefore shall not take a Traverse: for this intendment of Law being answered by matter expressly in the plea shall never be traversed, as in the case put of a Feoffment, *prima facie*, it shall be intended to be to the use of the Feoffee, yet when the other party maintains that this Feoffment was to his use, he shall not take a Traverse to that which the Law intends and presumes.

And if a man upon speech had with a Hunter, saith, That he hath murdered all the Hares within 7. miles of his house, and another answer and say, he is a Murtherer indeed, wherupon the Hunter brings an Action upon the Case against him, for saying, that the Plaintiff was a murtherer, the Action will well lye.

Yet when the other shall discover the communication wherupon the words were spoken, this shall be a good Bar without a Traverse, yet if it be true that there were no such communication between the parties as is mentioned in the Bar, the Plaintiff then hath good cause of Action, and therefore he may well say, *De injuria sua propria absque tali causa*, and this being found it shall be against the Defendant.

So upon speech of a Butcher who had killed a Toco. Oxen in a year, and one hearing it will say, that he is a notable Murtherer, this upon the matter disclosed is not actionable.

And it shall be mischievous by a Traverse or by pleading generally not guilty, to put such speciall matter in the mouth of Lay-people, to give their Verdict upon, being ignorant, and therefore easie to be miscarried in their judgment, and therefore it shall be the rather admitted by speciall pleading to be put to the judgment of the barred Judges, then into the mouths of lay Gents.

And here when Fletcher speaking of the order to be taken by the Council, upon the Petition said, that the Earl would obey their order, to which the Defendant answered, that he knew not what the Earl would do, the said Fletcher said therupon, that he was a Subject, and what was the intent of Fletcher in saying so? no other, but that because he was a Subject, therefore he ought to obey; and if it be so to be understood, as of necessity it ought, (or else they were not spoken by Fletcher to any purpose, which cannot be intended) then shall the words following (being spoken therupon by the Defendant) be taken to be spoken in answer to the matter of the Speeches spoken by the said Fletcher, and this, is that he was sorry, and it was his grief that he must be so subject as to be bound therby to obey their Order: as if a man saith to another, that he was sorry that he was so subject, that he must obey a Judgment against him in the Queens Court, this is no cause of Action, for this tends but to his subjection to the Law, or good order, or the like, which do not give cause of Action: As if one saith of another, that he is of the Temple, who alwaies rebell against the Governours of the said house, then saith another to him, Will you then say and maintain that he is a Kibell?

a Rebell, yes, sayes one of the other, I will up so; If an Action be brought for the last words, the Action will lye, but if the other discover the circumstances of the Speech in the Bar, wherupon it was spoken, the Action will not lye: And this the Defendant may well do without traversing that which is alledged, because he acknowledgeth it, although in another sense, then the Law *Prima Facie* imports upon the Declaration.

And if in Speech between two, one of them saith of a stranger, that he hath treacherously betrayed his friend in revealing all his secrets, and counsell, wherupon the other then saith, that he hath done as a Traytor therein, and the other saith to him again, he is a Traytor, and he answering to it, saith, true, he is a Traytor: Now if the stranger brings an Action of the Case against him, for saying of these last words, *Prima Facie*, it imports good cause of Action, without any Innuendo, as that he intended thereby that he was a Traytor to the Queen, because the words in common intendment have such a sence, yet upon the matter disclosed by way of Bar, with the circumstances how they were spoken, the Plaintiff shall be barred, if he cannot maintain that they were spoken without such a cause, which alter the intendment that the Law hath otherwise of the words.

And Gawdy agreed also, that in such cases the Defendant may plead the generall Issue, and upon the matter also the Jury ought to find him not guilty.

But Popham and Clench sayd, that this was a dangerous matter to be put in the mouths of the Lay Gents, as hath been said before, and therefore to put it to the Iudgment of the Law by pleading.

And for the exception they ought to have shewn here, where, by whom, and against whom the Petition was delivered, to this they said, that the exception was to no purpose, for this was but a conveyance to the Speech used, which Speech was the substance of the Bar; and in this they put the case of the Lord Cromwell which was in this Court, 22 Eliz. Rot. 752. In an Action upon the Statute of *Scandalum Magnatum*, by him brought against Thomas Dye Clark, for saying to the Lord Cromwel, It is no news though you like not of me, for you like of those that maintain Sedition against the Queens proceedings; in which the Defendant said, that he was Vicar of North Linham, in the County of Norf. and that the Plaintiff mentioned one Vincent Goodwyn Clark at such a time, and one John Trendle at such another time, neither of them being licenced to preach in the said Church, against the will of the said Defendant, and shew how they severally preached there in their Sermons (and shew certainly in what point) Seditious Doctrine against the Laws of the Church, as against the Crosse used in Baptisme, and the wearing of the Surplice, and that afterwards in speech thereupon between the said Plaintiff and him, the Plaintiff said to the Defendant, That the Defendant was a false knave, and said in English words; that he liked not of the Defendant; wherupon the Defendant said the words comprised in the Declaration Innuendo, That he liked of the said Goodwyn and Trendle who maintain Sedition (Innuendo) seditious Doctrine against the Queens proceedings. *Innuendo predict Leges & Stat. Eccl. sic hujus regni Angl. &c.* And the Plaintiff was put to answer, *Scilicet de injuria sua propria absque tali causa, &c.*

And note in this case, the Defendant would first have justified for the matter preached by one, and it was not allowed by the Court, but he was put to speak to both, or otherwise it had not been good, because his speeches were in the plurall number, to wit, That he liked of those, which refers to more then to one. And it was said in this case, that the word (Subject) might have severall significations according to the circumstance wherupon it is spoken: As Subject generally without more, is to be intended of the Queen, but according to the circumstance, it may be said, Subject of England, or Subject of Ireland,

land, or Subject to the Law, or subject to any other authority, or power set over him, or subject to his Affections.

And if a man saith of another, that he is a Subject, and therefore he ought to serve the Queen in her Wars, and he answers, that he is sorry for that, and is grieved for it, no Action will lye for this, because the grievance refers to service, which is to be done, and not to his Subjection as a Subject.

Dillon *versus* Fraine.

See this in
Cook lib. 1.
120. by the
name of Chud-
leighs case.

9. **T**respasse brought by William Dillon Esquire, against John Fraine, for breaking of his Close at Tavestock in the County of Devon, called Soden, upon not guilty, and a speciall Verdict, the case appeared to be this, to wit, that Sir Richard Chudleigh Knight, was seised in his Demesne as of Fee, of the Mannor of Helcor, with the Appurtenances, in the County of Devon, of which the said Close was parcel, and so seised, 26 April, 3. & 4. Phil. & Mar. by his Deed of Feoffment, of the same date enfeoffed Sir Tho. Saintleger Knight, and others, and their Heirs, of the said Mannor, to the use of the said Sir Richard Chudleigh and his Heirs, of the body of the said Elizabeth, then the wife of Richard Bainfield Esquire, lawfully begotten, and so, default of such Issue, then to the use of the said Sir Richard Chudleigh, and of his Heirs of the bodies of other wives, of other persons lawfully begotten: And so, default of such Heirs, then to the use of the performance of the Will of the said Sir Richard Chudleigh for 10. years after his decease, and after the said Term finished, then to the use of the said Sir John Saintleger and his Co-feoffees and their Heirs, during the life of Christopher Chudleigh, Son and Heir apparant of the said Sir Richard, and after the death of the said Christopher, then to the use of the first Issue Male of the body of the said Christopher, and to the Heirs Males of the body of this first Issue Male, and so, default of such Issue, to the second Issue Male of the body of the said Christopher, & to the Heirs Males of the body of this second Issue Male, and so to the tenth Issue Male: And so, default of such Issue, then to the use of Thomas Chudleigh, another Son of the said Sir Richard, and of the Heirs of his body lawfully begotten: And so, default of such Issue, to the use of Oliver Chudleigh another Son of the said Sir Richard, and of the Heirs of his body lawfully begotten: And so, default of such Issue, to the use of Nicholas Chudleigh another Son of the said Sir Richard, and of the Heirs of his body lawfully begotten, and so, default of such Issue, to the right Heirs of the said Sir Richard Chudleigh for ever; where by they were seised accordingly, after which the 17th. of Novemb. 5. & 6. Phil. & Mar. the said Sir Richard died without any Heir of the body of any of the wives before mentioned: And after that the said Christopher took to wife one Christian Strecheley, after which, to wit, the 14th. day of August, 1 Eliz. the said Sir John Saintleger and the other feoffees, by their Deed of the same date, enfeoffed the said Christopher of the said Mannor, to have and to hold to him and his Heirs for ever, to the use of the said Christopher and his Heirs, the said Oliver Chudleigh then being living, after which, to wit, the 20th. day of September, 3 Eliz. the said Christopher had Issue of his body lawfully begotten, one Strechly Chudleigh his first Issue Male: And after this, to wit, the 30. day of March, 5 Eliz. the said Christopher had Issue of his body lawfully begotten, one John Chudleigh his second Issue Male, after which, to wit, the first day of July, 6 Eliz. the said Christopher by his Deed indented of the same date, and inrolled within six months, according to the Statute bargained and sold the said Mannor to Sir John Chichester Knight, and to his Heirs, and in the interim also between the date of this Deed, and in the inrolment thereof, to wit, the 6th. day of July, in the same 6th. year, by his Deed of the same date, the said Christopher enfeoffed the said Sir John Chichester and his Heirs of the said Mannor, and by the same Deed warranted it for him and his Heirs,

to the said Sir John Chichester and his Heirs, whereupon the said Sir John Chichester entred into the said Mannor, after which, to wit, the first day of October, 12 Eliz. the said Christopher died, after which the 7th. day of November, 13 Eliz. the said Stretchley Chudleigh died without Issue of his body. And after the death of the said Sir Richard Chudleigh, to wit, the 6th. day of September, 7 Eliz. the said Sir John Chichester infeoffed the Philip Chichester and his Heirs of the said Mannor, to the use of the said Philip and his Heirs.

And the said Close being Copehold and Customary Land of the said Mannor, demisable by the Lord of the same Mannor, or his Steward, for the time being, for life or lives by Cope of Court roll, according to the custom of the said Mannor.

The said Philip at a Court holden at the said Mannor, for the said Mannor, the 8th. day of December, 15 Eliz. by Cope of Court roll granted the said Close to the said John Fraine, for Term of his life, according to the custom of the said Mannor, after which, to wit, the 11th. day of March, 18. Eliz. the said John Chudleigh being now Heir to the said Christopher, infeoffed the said William Dillon of the said Mannor, to have and to hold to him and his Heirs, to the use of the said William and his Heirs for ever, whereby he entred, and was seised, untill the said John Fraine entred into the said Close upon him, the 8th. day of February, 30 Eliz. upon which entry of the said Fraine this Action is brought.

And for difficulty of the case it was adjourned into the Exchequer Chamber before all the Justices and Barons of the Exchequer; And there it was agreed by all, that a Warrantie descending upon an Infant shall not bind him, in case that the entry of the Infant be lawfull into the Land, to which the Warrantie is united: But the Infant ought in such a case to look well that he do not suffer a descent of the Land after his full age; before he hath made his re-entry for then the Warrantie, when he is to have an Action for the Land, shall bind him.

And they agreed also that a Copehold granted by a Disseisor, or any other who hath the Mannor of which it is parcel by wrong, shall be avoided by the Disseisee, or any other who hath right to the Mannor by his entry or recovery of the Mannor.

And so by Popham it was agreed by the Justices in the case of the Mannor of Hasselbury Brian, in the County of Dorset, between Henry late Earl of Arundell, and Henry late Earl of Northumberland: but then he said, that it was agreed, that admittance upon surrenders of Copeholders in fee, to the use of another, or if an Heir in case of a Descent of a Copehold were good, being made by a Disseisor of a Mannor, or any other who hath it by Tort, because these are acts of necessity, and for the benefit of a Stranger, to wit, of him who is to have the Land by the surrender, or of the Heir: And also Grants made by Cope by the freeholder, upon condition of a Mannor, before the Condition broken, are good, because he was lawfull Dominus pro tempore.

And for the matter upon the Statute of 27 H. 8. what shall become of this future use limited to the first, second, and other Issues Males not in Esse at the time of the feoffment.

Ewens, Owen, Bateman, and Fennor said, That an Use at Common Law is no other then a confidence which one person puts in another, for a confidence cannot be in Land, or other dead thing, but ought alwaies to be in such a thing which hath understanding of the trust put in him, which cannot be no other then such a one who hath reason and understanding to perform what the other hath committed to him, which confidence shall bind but in privity, and yet the confidence is in respect of the Land, but every one who hath the Land is not bound to the confidence, but in privity shall be said to be in the Heir

Use, what it is,

Heir, and the Feoffee who hath knowledge of the confidence, and in him who cometh to the Land by Feoffment without consideration, albeit he hath no knowledge thereof, and yet every Feoffee is not bound although he hath knowledge of the confidence, as an Alien Person, Attaint, and the like, nor the King, he shall not be seised to anothers use, because he is not compellable to perform the confidence, nor a Corporation, because it is a dead body, although it consist of naturall persons; and in this dead body a confidence cannot be put, but in bodies naturall.

And this was the Common Law before the Statute of 27 H. 8. When the letter of the Statute is not to execute any Use before that it happeneth to be an Use in Esse; for the words are, Where any person is seised to the use of any other person, that in such a case, he who hath the Use shall have the same Estate in the Land which he had before in the Use; Ergo, by the very letter of the Law he ought to have an Estate in the Use, and there ought to be a person to have the Use before the Statute intends to execute any possession to the Use, for the words are expresse, that in every such case he shall have it, therfore not another: And therfore the Statute had purpose to execute the Uses in possession, Reversion, or Remainder, presently upon the conveyance made to the Uses: But for the future Uses which were to be raised at a time to come upon any contingent, as to the Infants here, not being then born, the Statute never intended to execute such Uses untill they happen to have their being, and in the mean time to leave them as they were at Common Law, without meddling with, or altering of them in any manner untill this time, and if before this time, the root out of which these contingent Uses ought to spring be defeated, the Use for this is utterly destroyed, and shall never afterwards have his being: as here by the Feoffment made by the said Sir John Saintleger and his Co-feoffees, who then were but as Tenants per antea, to wit, for the life of Christopher, and which was a forfeiture of their Estate, and for which Oliver Chudleigh might have entered, it being before that the said Strechley or John Chudleigh were born, the privity of them from Estate being the root out of which this future use ought to have risen is gone and destroyed, and therfore the Contingent Uses utterly thereby overthrown.

As if before the Statute of 27 H. 8. Tenant for life had been, the remainder over in fee to an Use: If the Tenant for life had made a Feoffment in fee, and he in the Remainder had released to the Feoffee, the Use had been gone for ever, so in all these cases of contingent Uses at this day, for he who cometh to the possession of Land by Disseisin, or wrong done to the Possessor, who is seised to anothers use, shall never be seised to anothers use.

And the case being so, that it is out of the letter of the Statute to execute such contingent Uses, it is more strong for them out of the meaning of the Statute to execute, then before they happen to be in Esse: for this shall be to make all mischiefs comprehended in the Preamble of this Statute, and against which the Statute intended to provide sufficient remedy in a worse mischief then they were before the making of the same Statute, and this shall be but a perverse instruction of the Statute.

And they said, that the subtleties used from time to time by means of those Uses, to the great deceit and trouble of the people, were the cause of the making of this Statute, 27 H. 8. and by all the Statutes formerly made touching Uses, it appeareth that they were all taken to be grounded upon fraudulent and crafty devises, and therfore this Law had no great purpose to favour them, but a Fortiorari, not to make them in worse case by means of the Statute then they were before, and therfore it shall not be taken that the Use is executed by the Statute, which stands upon a contingency, of which a greater mischief will ensue, then there was in such a case before the Statute, and therfore by the Feoffment made in the interim, before the birth of the Infants,

fants, which otherwise ought to have preserved the Use, this Use was utterly destroyed; and although the Feoffee of Christopher had notice of the Use, yet this doth not now help in the case, because the Feoffment did wrong to the Estate first settled, which was subject to the Use, and extinct in the same possibility which had been otherwise in the Feoffees to have given livelyhood to the said Contingent Use: And therefore the Judgment by them ought to be, that the Plaintiff shall be barred.

Talmesley, That the great mischief which was at Common Law upon these Feoffments to Uses, was, that none could know upon the occupation of the Land, who was true Owner of the Land, for Cestuy que Use was the Person of the Profits, but in whom the Freehold or Inheritance of the Land was, there were not many which knew, wherby great mischief came to the assurances which men had of Land which they purchased, and by it men knew not against whom to bring their Actions to recover their Rights, and by it Wives lost their Dowers, Husbands their Tenancy by the Curtesie, Lords their Escheats, Wardships, and the like.

And this mischief hapned by reason that one had the profit, and another the estate of the Land: And the Statute was made to put the Land and the Estate quite out of the Feoffee, who before did not meddle with the Land to Cestuy que Use, who before had but the occupation and profits of the Land, and to this intent the letter of the Law serves very well, which says that the Estate of the Feoffee shall be clearly in Cestuy que Use, and therefore nothing by the intent and letter of the Law is now to remain in the Feoffee, no more then a Scintilla juris nemor'd in Brents Case in my Lord Dyer. Eliz. and the whole Estate in the interim untill the contingent happen shall be in them who have their Uses in Esse, and when the Contingent happen, the Statute gives place to this Contingent Use, and by the execution thereof comes between the Estates before executed, and as out of these by the Statute, but nothing is now after the Statute in the Feoffees, for the purpose of the Statute, was (as I have said) to take away all from the Feoffee, for all was debested from him, because that betwixt the Feoffor, & the Feoffee was all the fraud before the Statute, and the very letter of the Statute is to extinguish and extirpate the assurances fraudulently made, which was alwaies by reason of assurances made between the Estate of the Land in one, and the possession thereof in another, and to cause that now that the Estate shall be to the use, where the occupation was before: And this Statute was not made to extinguish or discredit Uses, but to advance them, as by bringing the very Estate in possession to the Use, and by it the trust now taken from all others who were trusted with it before, so the Statute doth not condemn the uses, but the fraud which was by reason of them before. And the Statute being, that the Estate, Right, and Title of the Feoffees shall go to the uses, therefore nothing remaineth in the Feoffees, but all by authority of Parliament adjudged to be in Cestuy que use, which is the highest Judgment that can be given in any Court, and the words (Stand and be seised at any time) refer as well to the future, as present uses, and the Statute intended as well to help the uses which shall be upon any Contingent, as those which are at present, for a future or contingent Use is to be said an Use, according to its nature or quality, and it shall be executed according to its quality when it happen. And the words are, that the Estate which was in the Feoffee shall be in Cestuy que use and not the Estate which is, and therefore when the use happeneth to be in an instant, the Estate which at the first Livery was in the Feoffee, to this use shall now be executed in possession to this contingent use, albeit it self was altogether executed (as I said before) in the Uses which were in Esse, and if so, it followeth that nothing which is done in the mean time by the Feoffee or can be done by any other, can prejudice or hurt the execution of this Use in contingency when the contingency happen.

¶

And

Dyer 229-339

And for the case of Brook, 30 H. 8. it is plain in point, which is this.

A Covenant with B. that if B. enfeoff him of three acres of Land in D. that then the said A. and his Heirs, and all others seised of such Lands shall stand therof seised to the use of the said B. and his Heirs, after which A. enfeoffed a stranger of this Land, after which B. enfeoffed the said A. of the said three acres, now the use shall be to the said B. and his Heirs of the said other Land, for the Statute so binds the Land to this Contingency when it happens, that by no means it can be defeated, and this is the cause that Leases made by force of Provisoes comprised in assurances are good, and cannot be avoided, for the Interests to these Leases is wrought by the first Livery and the Statute, and therefore upon the matter, I conceive, that Judgment ought to be given for the Plaintiff.

Gawdy conceived that it is executed by the intent, but not by the letter of the Statute, for the purpose was to remove all the Estate from the Feoffee, and to put it in Cestuy que use wholly, to wit, in possessions, to the Uses which were in Esse, and in alegance as to the Uses which were to come and contingent; and now by the same Statute the contingency of the possession shall go in licence of the contingent Use, and now an Use limited to one for life, with Remainder over to the Heirs of the body of I. S. or to the first Son of I. S. shall be in the same manner as if Land at this day had been letten to one for life, with Remainder over to the Heirs of the body of I. S. or to the first Son of I. S. and not otherwise, for the quality which he had in the Use, the same (by the very letter of the Statute) he shall now have in the possession and Estate of the Land, and the Statute is not to undo any Use, but to transfer an Estate in the Land to the Use.

But he said, That by the Feoffment made to Christopher, the Contingent remainder which was devised in Stretchly and John Chudleigh depending upon the Estate which Sir John Saintleger and his Co-feoffees had for the life of Christopher, is utterly gone and destroyed in the same manner, as where a Lease is made for life, the remainder to the right Heirs of J. S. or to the Heirs of the body of J. S. if the Tenant for life dies, or aliens, whereby he makes a forfeiture, and determines his Estate in the life of the said J. S. his Heir shall never have the Land by the remainder afterwards, because he was not in Esse, as an Heir at the time when the Estate ended, for there cannot be a remainder without a particular Estate, neither can it stand or be preserved.

And as in this case without a particular Estate of Free-hold, a Remainder cannot be, no more in the case now in question, being now become by means of the Statute, as if it had been an Estate executed in possession; and for this cause only he conceived, that Judgment ought to be given against the Plaintiff.

And Clench agreed with this opinion in all, and both of them agreed, if there be none to take the Use according to the limitation at the time, when it falleth to be in Possessions, that he shall never take it, although it happen to be in Esse afterwards.

Clark said, that Uses were not at Common Law, but grew by sufferance of time, as appeareth by the words of the Statute it self, and the mischief and subtlety which was before this Statute was not in the Fine, Feoffment, or other Assurances of Land, but by means of the Uses limited thereupon, contrary to that which was used in the ancient course of the Common Law, and the Statute was made to reduce the Common Law to its ancient force and course, and therefore ought to conceive such a construction, as may agree with the purpose of the makers of the Statute, and therefore the best construction of this Statute is, not to execute other manner of Uses, but in some cases to extinguish them, as where it is such, as will make the case in as ill, or worse condition then it was before the making of the Statute.

It hath been agreed by all, that the Statute doth not execute any Use which was suspended at the time of the making of the Statute, as by reason of a Disseisor, or the like hapning before; and if it doth not execute the Use which is in suspense for the right which he had in the Use, how can it execute the Use which hath not any being? for in such cases, of Infants not born as here, untill they be in *Ætate naturæ*, the Use cannot have any being.

And in the same manner in all cases where the Use is not to rise but upon a future contingent: And what good shall this Statute do, if these leaping Uses shall arise without being impeached? Nothing, but alwaies nourish a Weape in the bosom of the Law, which is quite against the intent of the makers of the Statute.

The Law was made to preserve peace amongst the Subjects, and to assure their Possessions, as many other Statutes did, that were made about this time, as the Statutes of Fines, Wills, and others. But if the exposition of this Statute shall be as the other side hath taken it, it will make the confusion which will happen thereupon intolerable, and much worse then it was before the Statute was made and (as *Walsh* said) if no assurance can be made to be forcible against such a contingent Use, this will make it worse then it was before.

And he said, that it was not to be compared to the interest of Lands to begin at a time to come, nor to the case where a man devise that his Land shall be sold, in which case, he shall not be impeached by any manner of assurance, to be made in the mean time by the Heir, and the reason is, because the Vendee takes by the Will under the Estate of the Heir, and not by the sale, and therefore upon the matter, he conceived that the Plaintiff ought to be barred.

Periam said, that Uses were at Common Law, and to prove it, he vouched 24 H. 8. abridged in *Book*. And he said, that there have been alwaies trusts, Ergo, Uses ab initio, but they had not such estimation at the beginning as they have had by continuance of time, and so it was of Copyholds: And these Uses at Common Law bind but in privity according to the trust, but do not bind in the possession of him who cometh to the Land in the *Post*: But now by the Statute all trusts are gone, and the Estate of the Land it self transferred to the Use, and now the Use guides the Land, and not the Land the Use.

And the Statute did not intend to destroy any Use, but to bring it back to the Possession, according to the course of the common Law, and to avoid the fraud.

And as before the Statute the Use it self in such a case of Contingency was in obedience for the time, so now the Estate it self is in obedience by the Statute, which wills, that he shall now have an Estate in the Land it self, of such a quality as he had before in the Use; for the Statute puts all cleerly out of the Feoffees, and it is not inconvenient to have a Possession so to a Contingent Use, and if it had not been in the words of the Statute, yet (as hath been sayd) it shall be so taken by the intent of the Statute; for it never was the intent of the makers of the Statute to do wrong to any by means of the Statute. And therefore he put the case of *Cramer*, who made a Feoffment to the use of himself for his life, and after his decease to the use of his Executors for years, this Estate for years is not now vested in any, because a man cannot have an Executor during his life, and yet it remains as in the custody of the Law, untill there are Executors to take it.

And he said, that the case of the Lady *Wray* was as strong to prove the case in question, to be, at he takes it, which cannot be answered, for if she had married with the Lord *Wray* by the assent of the Councell assigned for it, according to the agreement, she had taken an Estate by the Contingency, but in as much as she did not do it, it was otherwise.

And we are to consider well, what we do in this case, it is a Tree, the branches wherof over-shadow all the Possessions of the Realm in effect, for the

the Estates and Leases in manner of all stand upon those assurances to Uses, and to pull up such a Tree by the roots, is to put all the Realm in a confusion, and therefore if there be any mischief therein, it is better to help it by Parliament, then to alter it by Judgment. And so upon the whole matter, I conceive that Judgment ought to be given for the Plaintiff.

Anderson, That an Use was not at Common Law, for the Common Law had no respect to it, but to the Feoffee, and it was the person who by the Law had any thing to do in the Land, and not Cestuy que Use, for he might punish Cestuy que Use for his meddling with the Land, and Cestuy que Use had no remedy against him by no means; But by Subcepna in the Court of Conscience.

And further, an Use being limited to another in Fee, no Use can be limited further thereupon for any Estate. And it hath been well said, that the letter of the Statute of 27 H. 8. did not tend to execute this Use which was not in Esse, and for the intent thereof, that it did not tend to execute any contingent Use untill that it happen, which is proved by the case, that an Estate for years being assigned over, or granted to an Use, the Use of this is not executed by the Statute of 27 H. 8. as it was agreed about 27 Eliz. and what was the reason in the case, but because there was not any Seisin in the Use, but only a possession to the Use: wherby the words of the Statute are much to be regarded. And here how can there be a Seisin to the Use which is not? it cannot be, and therefore for the like reason, as in the other case it is never executed, nor shall be removed by means of such an Use, untill it hapneth to be an Use in Esse.

And for Brents Case, I have alwaies taken the better opinion to be, that the Wife cannot take in the case for the mean disturbance, notwithstanding the Judgment which is entred thereupon, which was by assent of the parties and given only upon a default made after an Adjournment upon the Demurrer, for he said, that he had viewed the Roll thereof on purpose; and if it be, that such a Contingent Use be not executed untill it hapneth to be in Esse, here it appeareth, that by the Feoffment Christopher is in, of another Estate which was not subject to the Use, because he is in by forfeiture and wrong made to this Estate, and therefore not bound to the Use in Contingency, although he made it without consideration, and although he had notice of this contingent Use, and therefore this contingent Use utterly defeated before it had any being.

But in all the Cases put on the other side, it doth not appear that there was any thing done in disturbance of these mediate uses before they hapned, and therefore not to be compared to this case, wherby he conceived that the Plaintiff ought to be barred.

Popham said, That in as much as the manner of assurance made by Sir Richard Chudleigh may seem strange, and in some manner to touch the reputation of the said Sir Richard (who was a grave and honest Gentleman) to those who heare it, and do not know the reason why he did it, which I remember to be this as I have heard, to wit, That the said Christopher had killed one Buller a Gentleman of good reputation, wherupon he fled into France, and the said Sir Richard doubting what would become of his Estate, if he should dye before he had settled his Land, and yet having a desire to have power to undo the assurance which he purposed to make, if he pleased, his Councell then thought the best way to make and devise the assurance, so, that such an Estate of Inheritance might thereby be in him which could not descend to the said Christopher, and yet such, that he might thereby undo the assurance made by the Recovery when he pleased, and yet such also as should never take effect in any of the Issues of his other Wives, to the prejudice of his right Wives, because he never had a purpose to marry with any of these Wives.

And

And to that which hath been touched by Periam, That this Limitation first made is a Fee-simple in Sir Richard, I conceive clearly the contrary. For if it should be so, then no Use could be limited over upon this Fee-simple, as hath been said before, and therfore all the remainder of the Case had been to no end; but he said, that it was an Estate-tail speciall in Sir Richard, and denied the opinion of Ayscough taken so in 20 H. 6. and this by reason of the Statute of Donis conditionalibus, which willeth Quod voluntas donatoris secundum formam doni in charta doni manifeste expressam de cetero observetur. And here it is expresse, that the Heirs of Sir Richard begotten upon any of the said Wives shall have the Land, and therby it shall be understood that his Heirs shall be intended by common intendment the Heirs by him. To which opinion Anderson agreed.

And for the matter, Popham conceived clearly that there was not any such use at Common Law as we commonly call an use, and yet he acknowledged there were alwaies trusts at Common Law; but every trust is not to be said an use: for none will doubt but that a trust may be, and is many times put in others at this day, as upon purchases made in other mens names, and assurances also upon trust, and yet we will not say that this is an use, and without doubt such trusts were at Common Law, but not the uses aforesaid, and the reason that moved him to take the Law to be so, was, that he had not seen any ancient record, Statute, or Book of Law, nor any writing before the time of Ed. 3. which made any mention of this word use; and if it had been at Common Law, without doubt (as they said) some mention would have been made thereof. The reasons which are alledged in 27. H. 8. and in the case vouched 24. H. 8. that a trust was at Common Law is, by the one of them the *Causa Patrimonii prolocuti*, which (as they pretend) ought to prove that there was a trust at Common Law.

And the other the Statute of *Marlbridge*, that the Lord in case of Wards against Feoffments made by Collusion, which Feoffments (they alledge) prove that a trust then was.

To which it was said, that the gift made by a woman to another, to the intent that he shal marry her, hath in it a Condition more properly implied, to wit, that if he doe not marry her, that she shall have her land back againe, for which the Common Law gives her remedy by the Action aforesaid, for if it had been but a trust, no remedy had been by the Common Law.

And for the Statute of *Marlbridge* the contrary therunto is manifestly proved, for the Statute speaks but of Feoffments made to Heirs apparants or upon Condition, or to the intent to enfeoffe the Heir at his full age, or the like, in which cases the use alwayes goes with the Possessions, and is not to the Feoffor: And the Statute of 4. H. 7. was made in vaine, which gives the Wardship of Cestuy que use where no Will is declared, which had not been needfull if Feoffments within the Statute of *Marlbridge* had been said to have been to Uses.

And without doubt if those who made the Statute of *Marlbridge* had then had knowledge of these Feoffments to Uses which were so mischievous, and more then the other Feoffments by Collusion, they then would have provided remedy for these cases of Uses.

Also the Statute *de Religiosis* ordains that *Nec arte, nec ingenio*, Lands shal not be conveyed in *Mortmain*, and therby it was conceived that a full provision had been made against these *Mortmains*, and yet in 15 Rich. 2. Provision was made against Uses conveyed in *Mortmain* to Religious or other Corporations of which they took the Profits.

And without doubt those who were so precise in the making of the Statute of Religions against Mortuaries, would also have made provision for the uses if they had then been known:

But to clear this point, without all controversie the Statute it self of uses, 27 H. 8. makes it plain, which saith expressly that by the Common Law of the Realm, Lands or Tenements ought not to passe from one to another, without solemn Liberty, matter of Record, or writing, and that these Feoffments to uses were Errours used and accustomed within the Realm, to the Subversion of the ancient Laws; therefore it stands not with the ancient Common Law of the Realm, as all the Parliament took it, which is more to be regarded then any Book touched. But see how, and when they began and crept in at Common Law, and it shall be easily perceived (as it hath been well said by some of those who argued to this point at the beginning) that they began by two means, to wit, by fraud, and by fear. And he said, that the first Book which he had seen in all the Books of the Law, which tend to an use, is the case of 8. Affise, which makes mention that the Conuisee of a Fine entred in to the Land in the right of another, which is to be taken to anothers use. And in the Quadregessimas of Edw. 3. mention is made of the Feoffees of the Lord Burgliss, who sued to the King by petition, and by the Statute of 50 Ed. 3. cap. 6. mention is made that divers gave their Lands to their friends to have the profits, and afterwards fled to privileged places, and lived there to the hinderance of their Creditors; And therefore it was provided that in such a case execution shall be made, as if no such assurance had been made. And by 2 Rich. 2. these are called Feoffments to uses, and made by craft to deceive Creditors, and there is the first mention which is made in any Statute of the word (Use.) So fraud hath been alwaies the chief foundation of these Uses; yet in time they began to have some credit in the Law. And this was when men saw that the Court of Conscience gave remedy in these cases against such who had not the conscience themselves to perform the trust put in them, and to take away the danger which hapned to an infinite number of good Subjects, upon the Garboyle which hapned between the time of E. 3. and that of King H. 7. caused that in effect, all the Possessions of the Realm were put in Feoffments to uses. And the first case in the Law which speaks of this word (Use) which he ever saw was (as he said) in 5 H. 4. And in the like case by Gascoign, 7 H. 4. no remedy is given by the Law for Cestuy que use, and afterwards it crept into the Law as appeareth, yet as an Error of long time used: And if before the Statute of 27 H. 8. a Lease had been made for life, the remainder in Fee, to the use of B. for life, the remainder to the use of the first Son of the said B. and so further as here:

If the Tenant for life had made a Feoffment in Fee to a stranger, and had not given the stranger notice of the Use, and all this were without consideration, and afterwards he in the Remainder in Fee to the Use had released all his Right to the said stranger, every one of them had been hereby without remedy for their Uses: Were the Son of B. born before or after this wrong done: So if it were at Common Law before this Statute as hath been well said, and the Law being so before this Statute, then he said it was to be seen what was to be done in the case after the Statute, which will stand altogether upon this, what will become of these contingent Uses to the Sons not born at the time of the said Feoffment made by Sir John Saintleger and his Co-feoffees, by this Statute of 27 H. 8. and it seems to him clearly that no possession is executed to any contingent use by this Statute, untill it comes in being; and that as the case is here and in some other speciall cases it shall never be executed: And one cause why such a contingent Use shall not be executed, is, because it doth not stand with the letter of the Law, but rather is against the letter.

Another cause is, because it is utterly against the intent of the Law to execute

execute it, as the case is here. It doth not stand with the letter of the Statute, for this is, Where any person or persons stand seised to the use of any other person or persons, &c. And it is clear that none can stand seised to the use of him who is not, neither can he who is not in rerum natura have any use; therefore the case here doth not stand with the letter of the Statute to be now executed,

And further, the words following are, That in every such case, every person who hath such an Use in Fee-simples, Fee-tail, for life, for years, &c. or otherwise in Remainder or Reversion shall stand hereafter seised and adjudged in lawfull Estate and Possessions of the Lands, &c. of such an Estate as he had in the Use: The words then in the Statute being so precise as they stand, to wit, that in such case he who hath such an Use shall have the possession executed of such an Estate as he had in the Use, excludes all other who are not in it, to have it to be executed untill that they happen to be in the same case as of that which the Statute speaks. And if they had intended to have the Possession to be executed and transferred from the Feoffees to these contingent Uses, they would have made some mention thereof as well as they did of Reversions and Remainders, and they did not leave there, but mention this again, to wit, that the Estate, Right, Title, and Possessions which was in such person or persons which were seised to the use of any such person or persons, shall be hereafter clearly adjudged in him, or those who had or have such Use according to such quality, manner, form, and condition as he had before the use which was in them, by which it appeareth plainly, that the Right and Possession of the Feoffee shall not be vested in or to any, untill that he hath the use it self; for it is said, that it shall be in him, therefore they ought to have something in the Use by the very expresse letter of the Statute, before any thing of the Possession shall be executed or transferred by this Statute from the Feoffee to Cestuy que use: And how can this be said to be within the letter of the Statute, which hath so many and so precise words and branches against it. And therefore it is clear, that if the Feoffee to use were seised at the time of making of this Statute, that the use shall not be executed by this Statute, untill there be a regresse made by the Feoffee, or in his right to revive the former use, and it had been out of the letter of the Statute.

But to this I say, that how precise soever the letter is against the execution of these contingent uses, the intent thereof is yet more strong & precise against them, which I will prove clearly by the Statute it self, which is of greater authority then the particular opinion or conceit of any Judge whomsoever, for it is the Judgment of all the Judges, and all the Realm also which ought to bind all, and to which all ought to give credit. And to take the intent, the Statute was full that it was made (as is rehearsed) for the Disinherison which before was to true Heirs; for the defect which before was in the assurance of Purchases, for the mischiefs, in regard before men did not know (by reason of these Uses) against whom to bring their Actions to recover their Rights. To avoid perjury that it should not be so common as it was, by reason of the maintenance and support of these secret Uses, for the releif of the King & other Lords, as to their Escheats, Forfeitures, Wardships, Releases and the like, for the mischief which before hapned to Tenants by the Curtesie, and in Power, by reason of these Estates in Use; and finally for the great Inconveniencies which hapned by reason of them, to the great trouble and unquiet of the People: These were the great mischiefs that were before the making of the Statute, and these were the things for which the Statute intended to provide remedy, and if the exposition shall be as hath been on the other side, these mischiefs shall be on every part more mischievous by much, then it was before the making of the Statute, and that in such a manner, that it shall be impossible to help any of them but by Parliament; whereas alwaies the good and true construction of a Statute is to constrain

constrain it, so that it shall gi ve remedy to the mischief which was before, and not to make it more mischievous, and therefore examine it by parts.

And as to the disinherison of two Heirs, it appears now that by such exposition more inconveniences will arise, and that in a more dangerous degree then before the Statute; for before, for the Use the Heir had his remedy in conscience according to the trust, and he might have made a disposition of the Land it self, by the Statute of Rich. 3. as an Owner, for the advancement of his Wife, and his Children, and for payment of his debts, and the like. But as the case is now used by means of these perpetuities (as they are called) if the exposition of the other side shall hold place, the true Heir shall not only be continually in danger to loose his Inheritance, but by them the very bowels of nature it self shall come to be divided, and rent in peeces, for by reason of these the Inheritants themselves cannot make any competent provision for the advancement of their Wives, Daughters, or youngest Sons, as every one according to the course of nature ought to do, nor by reason of this can he redeem himself if he were taken Prisoner: And this will make disobedience in Children to their Parents, when they see that they shall have their Patrimony against their will, whereby such Children oftentimes become unnaturall and dissolute, of which I in my time have seen many unnaturall, dangerous, and fearfull consequences, not convenient to be spoken of. And it stales not there, but it causeth mortall debate (as to blood) between Cousin, and Cousin, Brother, and Brother, and not so only, but between the Father himself and his Children, of which every one of us have seen the experience, for the one ought to be as a watch upon the other, to see when any thing happen to be done, to give him advantage to disinherit the very true Owner.

And I say, that it is impossible that any can keep his Possessions which hath them tyed with these perpetuities, if the exposition of the Statute should hold place which the other side hath made. And I affirm precisely, that there is not any one in England who hath had such Possessions so bound by descent of Inheritance by five years of any value, but that he hath lost all, or part of his said Land at this time, let him be never so precise in making his Assurances, and yet he is not sure to have one skillfull in the Law alwaies at his elbow when he is to meddle with his Land. And therefore I put but this Case.

One who hath such a perpetuity with power to make Leases, rendring the ancient Rent, or more, hath two Farms, either of them of the ancient Rent of 20 s. a year but the one is worth 60 l. a year, and the other but 20 l. these are in hand to be better together, rendring 53 s. 4 d. for both together, therefore he hath lost all, or part of his Land, according to that of which the perpetuity is; so it is evident that it will happen to be more mischievous in time to come, and therefore by this exposition much more to the disinherison of the Heir, then it was before the making of this Statute. And which is more mischievous if a *Feme putain* happen to be in such a house who happen to have Children in Adultery, these Bastards shall have the Land against the will of the Father, to the utter disinherison of the true Heirs, and against the intent of him who made the limitation, by which we may see the just Judgment of God upon these who attempt by humane pollicy, to circumvent the divine providence of God for the time to come; and of this also I have seen an example.

And now to the mischief, that men do not know against whom to bring their Actions to sue for their Rights, and it is cleer, that now by such an exposition they shall be now in much worse condition then they were before, for before the Action was given against him who received the Profits, which is now gone by this Statute in the cases of Free-hold, and therefore if the other exposition shall hold place, it is cleer that untill the Statute of 13 *Eli.* men

men might have been by means of this Statute put out of all remedy to recover their rights by any manner of Action, as some put it in practice, as to make Feoffments to the use of the Feoffor, and his Heirs, untill any intend to bring an Action against him for this Land, and then over to others upon the like limitation, with a Proviso to make it void at his pleasure, and the like, and what mischief shall then be for the time upon such an exposition? Such, that Justice therby cannot be done to the Subject; and what an absurdity shall it be to say, that such an Exposition can stand with the intent of the Makers of the Law.

And to that which hath been argued on the other side, and first to that which was said by Walmesley, That the Right, Estate, and Possession is wholly out of the Feoffee, and vested to the Uses, which have their being by the Statute, and that upon the Contingents hapning, their Estates uncouple and give place to the contingent Use then executed, and that the execution thereof shall be by a Possession drawn to it out of the Possession which was before executed by the Statute in another: I say, that this Statute can by no means have such an exposition; for this is as much as to say, that an Use may arise upon an Use, contrary to what is adjudged, 36 B.8. That a Bargain and Sale by a Deed indented, and enrolled, cannot be at this day of Land to one, to the Use of another.

And if a man enfeoff another to the use of J. S. and his Heirs, and if J. P. pay such a sum, that then the said J. S. and his Heirs shall be seised of the same Land to the use of the said J. P. and the Heirs of his body; J. P. paies the money, yet the Use doth not rise out of the Possession of the said J. S. But if it had been, that upon the payment the first Feoffee and his Heirs shall stand seised to the use of the said J. P. and the Heirs of his body, it shall be otherwise; therefore something remains to the first Feoffee in the Judgment of the Law.

And I remember, that when I was a Counsellor at Law in the time of the Lord Dyer, where a Feoffment was made to the Use of one for life, with Remainders over, with restraint to alien, and with power given to Tenant for life to make Leases for one and twenty years, or three lives, it was much doubted whether this power so limited to him without words in the Assurance that the Feoffee and his Heirs shall stand seised to these Uses, shall be good to make such Leases, or not? And therefore suppose that a man bargains and sells Land to one for his life by Deed indented and enrolled, and make therein a Proviso, that the Tenant for life may make such Leases, this is to no purpose as to power to make a Lease, but the strongest case which he put was, that of 50 B.8. which I agreed to be Law, as it is there put, whether it were before or after the Statute of 27 B.8. for it is not there put that the Feoffment was made upon any consideration to the stranger, in which case, although he had no notice of the first Covenant, yet in such a case he shall take the Possession subject to the Use, to which it was bound by the present Covenant: But if you consider the case well, you shall see that it was a case before the Statute, for it followeth presently in the same case, that it is there said, that it is not like the case where the Feoffees in Use sell the Land to one who hath no notice of the first Use, whereby it appeareth that it was a case before the Statute, for otherwise there had been no cause to have spoken then of the Feoffees to an Use, and by the same it appeareth, if the Covenantor had bargained and sold the Land to another, the same Use had never risen upon the Covenant, and therefore it is cleer against the Law, that the Possession shall be bound with such an Use in whosoever's hand it comes.

And to that which Periam saith, in the case of these Contingent Uses, they shall now by the Statute be in the same degree, as if Land it self had been so conveyed; and that now the Land shall be in Contingency in stead of the Use, and that by such manner it shall be executed, and that by such means

all is utterly out of the Feoffees, because the Statute was made to determine all matter of trust to be hereafter reposed in any Feoffee: this is well spoken, but not well proved; for as I have said before, it is an exposition quite contrary to the letter and intention of the Law. And I agree, as hath been said, if there be none to take the Use at the time that it falleth to be in possession, according to the limitation that he shall never take it afterwards, no more of an Use upon the Statute then of an Use at Common Law: As if an Use be limited for life, the remainder to the right Heirs of *I. S.* if the Estate for life be determined in the life of *I. S.* the remainder shall never vest afterwards in the right Heirs of *I. S.* no more then if an Estate had been so made: But this makes for me, to wit, that the Estate upon the Uses executed by the Statute, shall be of the same condition as Estates in possession were at Common Law, and that they being executed ought also to be such, of which the Common Law makes allowance.

And by way of argument, I agree for the time that it is, as hath been said by them who maintain that an Use may be in suspence, as to that which is an Use in its proper nature, for it is not properly said an Use, untill that it be said in Use, to take the Profits themselves: But I am to turn this Argument against him who made it, for if it be so, the Use can never be in suspence, and if so, it follows that no Possession by means of any such Use can be in suspence, but staies where it was before to be executed when the Use happens to be in being.

But as to that, that a Reversion or Remainder may be of that which we call an Use, so also may such a Use be in suspence in the same manner as the Possession it self, but not otherwise.

And as to *Cramers Case* formerly put, the Law is so, because nothing appeareth in the case to be done, to the disturbance of this contingent Use in the interim before it happen. But upon the Case put of the Lady *Bray*, upon which it hath been so strongly relied, it was thus.

The Lord *Bray* made an assurance of certain Lands, to the use of certain of his Councill, untill the Son of the said Lord *Bray* should come to the age of 21 years, for the livelyhood of the said Son, and of such a Wife as he shall marry with the assent of the said Councill, and then to the use of the said Son and of the said Wife, and of the Heirs of the body of the said Son: The Father dies, the Son was become in Ward to the King, after which one of the said Councillors dies, the King grants over the Wardship of the said Son, after which the said Lord *Bray* by the assent of his Guardian, and of the surviving Councillors marries the Daughter of the then Earl of *Shrewsbury*, after which the Husband aliens the same Land to one *Butler*, and dies, and upon Action brought by the said Lady against the said *Butler* for the same land, she was barred by Judgment, and upon what reason? because she was not a person known when the Statute was made, which must be in every case of a Freehold in Demesne, as well in case of an Use, as in case of a Possession.

And therefore a Lease for years, the Remainder to the Heirs of *I. S.* then living, is not good, and the same Law of an Use. And so it was agreed by all the Justices very lately in the case of the Earl of *Bedford*, but in these Cases it remaineth to the Feoffor; and because it doth not appear at the time of the assurance who shall be the Wife of the said Son, so that there was not any to take the present Freehold by name of the Wife of the Son, she takes nothing by the assurance, but this reason makes for our side: to wit, That if there were none to take the Freehold in Demesne from the Use, when it falleth, he shall never take it.

The other reason in this Case was, because she was not married by the consent of all the Councillors, for that one was dead, nor according to the power given by the agreement, but by the authority of the Guardian, that the power which the Father had upon his Son was ceased.

And Note, That by a Disseisin the contingent Use may be disturbed of his Execution; but there by the regresse of the Feoffee or his Heirs when the Contingent happen it may be rebited to be executed: But by the release of the Feoffee or his Heirs, the Contingent in such a case by Popham is barred of all possibility at any time to be executed.

And to that which hath been said, that the generall and universall Assurances of men throughout all the Realm at this day are by means of Uses, and that it shall be a great deal of danger and inconvenience to have them now in question or doubt, and that it now trembleth upon all the Possessions of the Realm, and therefore it shall be too dangerous to pull up such Trees by the roots, the Branches wherof are such and so long spread, that they overshadow the whole Realm.

Popham said, That they were not utterly against Uses, but only against those, and this part of them which will not stand with the publike Weal of the Realm, and which being executed shall make such an Estate which cannot stand with Common Law of the Realm, or the true purport of the Statute; and therefore he said, that it was but to prune and cut off the rotten and corrupt branches of this Tree, to wit, that those which had not their substance from the true Sap, nor from the ancient Law of the Realm, nor from the meaning of the Statute, and so to reduce the Tree to its beauty and perfection.

The same reason he said, might have been made in the time of Edw. 4. against those Arguments which were made to maintain the common Recoveries to bar Estates-tail. But if such a reason had been then made, it would have been taken for a bare conceit and meer trifle, and yet Uses were never more common then Estates-tail were between the Statute of Donis conditionalibus, and the said time of Edw. 4. But the grave Judges then saw what great trouble hapned amongst the people by means of Intails, and what insecurity happened by means thereof to true Purchasers, for whose security nothing was before found (as we may see by our Books) but collaterall Warranty, or infinite delay by Voucher; and thus did the Judges of this time look most deeply into it, whereupon, upon the very rules of Law it was found that by common Recovery with Vouchers these Estates-tail might be barred, which hath been great cause of much quiet in the Land untill this day, that now it begins to be so much troubled with the cases of Uses, for which it is also necessary to provide a lawfull remedy.

But he said plainly, That if the Exposition made on the other side shall take place, it will bring in with it so many mischiefs and inconveniences to the universall disquiet of the Realm, that it will cast the whole Common-wealth into a Sea of troubles, and endanger it with utter confusion and drowning.

And to that which was said, That a Remainder to the right Heirs of J. S. or to the Heirs of the body of J. S. or to the first Son, as here are, so in the custody of the Law that they cannot be drawn out, & that therefore no forfeiture can be made by the Feoffment made by him who hath the particular Estate.

To that he said, That a Disseisin made to the particular Estate for life, draws out such Remainders to the right Heirs, as is proved expressly by 3 H. 6. where it is holden, that a collaterall Warranty bars such a Remainder in obedience after a disseisin.

And by Gascoigne, 7 H. 4. If such a Tenant for life makes a Feoffment in Fee, it is a Forfeiture, but he conceived that in the life time of J. S. none can enter for it, but this is not Law; and when by the Feoffment the particular Estate is quite gone in possession, and in right also, the remainder shall never take effect, by the very rules of Littleton.

And by 27 H. 7. which is, That a Remainder cannot be, unless there be an Estate upon which it may have dependency, which there it cannot; but in the case of a Disseisin made to a particular Estate, it is otherwise, because there the
Estate

Estate remains in right. And to say that it shall not be a Forfeiture, because the Feoffment was made to Christopher, who then had the Fee-simple which was limited to the right Heirs of Sir Richard Chudleigh, this is not so, for by 41 E. 3. The Tenant for life himself, who also had a Remainder in Fee-simple in himself, depending upon a mean Estate-tail in another made a Feoffment, and by it committed a Forfeiture to him in the Remainder in tail.

But if Tenant for life, Remainder in tail, Remainder in Fee, enfeoff him in the Remainder in tail, this is a Surrender of his Estate for the immediate Estate which was in him; wherupon this Term, Judgment was given in the Kings Bench for *Fraine* the Defendant, against *Dillon* who was Plaintiff. And it is entred, *Hill. 31 Eliz. Rot. 65.*

Baynes Case.

Burglary.

10. **A**T the Sessions holden at *Petigate* presently after this Term the case was this; one *Baynes* with another came in the night time to a Tavern in London to drink, and after they had drunk, the said *Baynes* stole a cup in which they drunk in a Chamber of the same House; the Owner of the said House, his Wife, and servants then being also in the House, and the cup being the Owners of the said Tavern, wherupon he was indited and committed, & this matter appeared in the Inditement, and agreed by *Wopham*, *Anderson*, and *Meriam* with the Recorder and Serjants at Law then being there, that this was not Burglary, and yet it was such a Robbery, whereby he was ousted of the benefit of his Clergy by the Statute of 5. E. 6. Cap. 9. and was hanged.

In which case
Shops in Lon-
don are Mar-
kets Overt, &
what not.

11. **A**Nd at the Sessions then next ensuing then holden, upon one who had stolen a silver Basin & Ewer of the then Bishop of *Worcester*, & the sale made openly in the day in a Scriveners shop in London to a stranger, the question was demanded of the Court whether the property were changed by this Sale, so that the Bishop shall not have his Plate againe, because it was alledged that they prescribed that every one of their shops in London are good Markets overt through all London every day in the week but Sunday; But agreed by *Wopham*, *Egerton*, *Anderson*, *Brian*, and others skilfull in the Law then being there, that such a generall custome is not good, and that this Sale made there, albeit it were openly in the shop so that every one passing by might see, it shall not bind the property as it shall doe in Market overt; for a Scriveners & Cutlers Shop or the like, is not proper for the Sale of Plate nor a place to which men will go to seek for such a thing lost or stole; But a Goldsmiths Shop is the proper Shop for it, as the Drapers Shop is for Woollen cloath, or the Mercers Shop for Silk, and the like, and to such men will go to seek for things of the like nature that are lost or stolen, and not to a Scriveners Shop or the like.

And they agreed also that a private Sale made in the Shops which are proper to the nature of the thing sold, so that the Passers by cannot in reason see it in their passage, cannot bind, for reason, (upon which the Law is founded) will not admit any such custome.

Hillary

Hillary Term, 37 Eliz. in the Kings Bench.

Westby *versus* Skinner and Catcher.

In Debt by Titus Westby Plaintiff, against Thomas Skinner and John Charcher late Sheriffs of London, Defendants. for 440 l. upon Nihil debet, pleaded, and a special Verdict found, the Case appeared to be this, to wit, One Anthony Bustard with others, were bound in a Recognizance in the nature of a Statute-staple of 440 l. to the Plaintiff wherupon the Plaintiff sued Execution out of the Chancery against the said Anthony and the other that were bound with him for the Bodies, Goods, and Lands of the said Obligers which writ of Execution was delivered to the said Defendants the 8th day of September 30. Eliz. the Defendants then being Sheriffs of London and the said Anthony being then in Newgate in Execution in the custody of the said Defendants for 240 l. at the suit of one Robert Deighton, and that afterwards, to wit, the 20th day of October in the same year the said Defendants were discharged and removed from their said Offices, and Hugh Difeley, Richard Saltonstall were then made Sheriffs of London, and that the said Anthony being in Execution for the one and the other debt, the said Defendant the said 20th day of October by Indenture delivered the said Anthony to the said new Sheriffs in Execution for the said debt of the said Robert Deighton not giving them any notice of the said Execution made for the Plaintiff, and suffered the said Anthony to goe at large; And whether the Defendants shall be charged for this escape was the question.

See this case in Coke 3. Report fol 71 8.

Prisoners in execution to be delivered over to the new Sheriff by Indenture, and all the executions to be therein moved

And the escape was alledged by the Declaration to be suffered by the said Defendants the said 20th day of October, 30 Eliz, and it was moved by Tanfield, that the new Sheriffs ought to take notice of their Prisoners remaining in the Goal, at their coming into their Office, at their perill, and ought to enquire and search for the causes that then were in custody, and not to deliver them of their own head without due course of Law.

And he put the case, That if the old Sheriff had been dead, in the mean time before the new Sheriffs had been made, that this be an excuse to the new Sheriffs that they had no notice for what cause this Anthony had been in Prison, if they suffer him to escape: And he said that it shall not, no more here, but per Curiam the new Sheriff shall not be charged with this Escape, as to the 440 l. of which they had no notice; for if this case which was private in the knowledge of the ancient Sheriff only upon a Writ directed to them at the suite of any party, the new Sheriffs cannot by intendment have any knowledge, unlesse it be given to them by the old Sheriffs, to whom the Writ of Execution was directed and delivered.

And the case of one Dabridgecourt, who was Sheriff of Warwick, and had one in Execution whom he kept in a private Prison by himself, for all his Executions in the Town of Warwick; and when he was discharged of his Office, and a new Sheriff made, Dabridgecourt said to the new Sheriff, That he had such a one in Execution in his custody, and offered to the said Sheriff to put him in the Indenture amongst his other Prisoners delivered to the new Sheriff, but would have had the said old Sheriff to have sent for the said new Sheriff to have taken him into his custody, but the new Sheriff refused to receive him, unlesse Dabridgecourt would deliver him into the common Goal of the County, which was in the Town of Warwick, wherupon afterwards the Prisoner escaped; And Dabridgecourt was charged with this Escape, and not the new Sheriff, for he is not compellable to take the Prisoners of the delivery of the old Sheriff, but in the common Goal of the County, and the old Sheriff remains chargeable with the Prisoner, untill he be lawfully discharged of him, and if the Sheriff dies, the party shall be rather

at a prejudice, then the new Sheriff, without cause charged with him. And in such a case the party who sued the execution may help himself, to wit, by the remaining of the body by a Corpus cum causa, whereby he may be brought to be duly in execution, and this under a due Officer.

And Anderson, Periam, and other Justices were also of opinion, that the said Skinner and Catcher are to be charged with the escape in the principal case, whereupon Judgment was given for the Plaintiff, which was entered; Hillar. 34 Eliz. Rot. 169. in the B.R.

Fulwood *versus* Ward.

2. **I**n a Writ of Annuity brought in the Common Pleas by George Fulwood Plaintiff against William Ward Defendant, the Case was thus.

The Queen was seised of a Barn and Tithes of Stretton, in the County of Stafford, for the life of the Lord Paget, and being so seised, demised it by Letters Patents, dated 21. June, 29 Eliz. to the said William Ward for 21. years, whereupon the said Ward by Writing dated, 30. June, 29 Eliz. granted to the said Plaintiff an Annuity or yearly Rent of 10 l. out of the said Barn and Tithes for 15. years then next ensuing, payable yearly upon the 8. day of November, with clause of Distresse. The Lord Paget died the first day of March, 32 Eliz. and for the Arrearages after his death, the Plaintiff brought this Writ of Annuity, and for the difficulty therof in the Common Pleas, the Case came this Term to be argued before all the Justices and Barons at Serjeants-Inn in Fleetstreet, where it was agreed by Walmesley, Fennor, and Owen, that the Annuity was gone by the determination of his Estate in the Land who made the Grant, for they said that presently upon the Grant made as before it was a Rent-charge, for by such a Rent granted in Fee, the Fee shall be in his Heirs, albeit the Grantee dies before any Election made; and such a Rent is payable from the beginning at the Land, as appeareth by 12 E. 4.

And by grant of Omnia, terras, tenementa, & hereditamenta, such a Rent will passe, ergo, it is a Rent-charge and not an Annuity untill the Election made, and by the determination therof in the nature of a Rent, the Election is gone, as by Babington and Martin, 9 H. 6. by the recovery of Land charged with such a Rent by elder Title, the Annuity is gone as it seems by their opinion, and by them and by Littleton upon a Rent-charge granted with Proviso, that he shall not charge the person of the Grantor, it will exclude the charge of the person, which proves that the Land is charged Originally, and not the person, for otherwise the Proviso would be void for the repugnancy; And if so, whensoever the Land is discharged, as by purchase, descent, or the like, the person thereby is also discharged, and therefore the Judgment here shall be, that the Plaintiff shall be barred.

But by the chief Justices, chief Baron, and all the other Justices and Barons, the Plaintiff ought to have Judgment in this case to recover the Annuity, for the Law gives him at the beginning an Election to have it as a Rent or an Annuity, which matter of election shall not be taken from him, but by his own Deed and folly, as in case where he purchase part of the land charged, in which case by his own Act he hath excluded himself of his Election. But if a Feoffee upon condition grant a Rent-charge, and presently break the Condition, whereupon the Feoffor re-enters, shall not the Feoffee be charged by Writ of Annuity, surely it shall be, against all reason that he by his own act, without any folly of the Grantee, shall exclude the Grantee of his Election which the Law gives at the beginning.

And they denied the opinion of 9 H. 6. to be Law; But if the Disseisor grant a Rent-charge to the Disseisee out of the Land which he had by the Disseisor

Disseisen by his re-entry, before the Annuity brought, the Annuity is gone; for this was his own act, yet in effect all of them agreed, that Prima facie, it shall be taken as a Rent-charge, of which the Wife shall be endowed, as hath been said, which passe by grant of Omnia hereditamenta, and which is payable at the Land; but the reason is, because it is expressly granted out of the Land, and also for the presumption of Law, that it is more beneficiall for the Grantee to have it in such a degree, then in the other. But neither the presumption of Law, nor the expresse Grant thereof as a Rent, shall not take away from the Grantee the benefit of his Election, where no default was in him, but that upon his Election he may make it to be otherwise, as ab initio. And therefore by Popham, If a Rent-charge be granted in tail, the Grantee may bring a Writ of Annuity, and thereby prejudice his Issue, because that then it shall not be taken to be an Intail, but as a Fee-simple conditionally, ab initio. And if a Termor for two years grant a Rent-charge in fee, this as to the Land is but a Rent-charge for two years, and if he avow for it upon the determination of the Term, the Rent is gone, but by way of Annuity it remains for ever, if it be granted for him and his Heirs, and assets descend from him who granted it.

And if a Rent-charge be granted in fee, and doth not say for him and his Heirs, if the Grantee brings his Writ of Annuity, the Heir shall never be charged therewith, yet if he had taken it as a Rent-charge, the Land had been charged with it in perpetuity.

And by him the cause why the Proviso that he shall not charge the person of the Grantor upon the grant of a Rent-charge is good, is, because the person is not expressly charged by such a Grant, but by operation of Law.

But in such a case, a Proviso that he shall not charge his Land is meerly void for the repugnancy, because there the Land is expressly charged by precise words, and therefore if it be expressly comprised in such a Grant, that the Grantee may charge the Land, or the person of the Grantor, at his Election; provided then afterwards that he shall charge his person, is not good, *Causa patet.*

And all agreed, that upon a Rent granted upon equality of partition, or for allowance of Dower, or for recompence of a Title, an Annuity doth not lye, because it is in satisfaction of a thing reall, and therefore shall not fall to a matter personall, but alwaies remains of the same nature as the thing for which it is given. And afterwards the same Term Judgment was given in the Common Bench, that the Plaintiff shall recover, which is entred, &c.

And in the same case, Clark vouched that it was reported by Benloes in his Book of Reports; where a Rent was granted out of a Rectory by the Parson who afterwards resigned the Parsonage, that it was agreed in the Common Pleas in his time, that yet a Writ of Annuity lies against the Grantor upon the same Grant, to which all, who agreed on this part, agreed that it was Law.

Butler *versus* Baker and Delves.

3. **I**n Trespasse brought by John Butler against Thomas Baker, and Thomas Delves, for breaking his Close, parcell of the Mannor of Thoby, in the County of Essex, upon a speciall Verdict, the Case was thus.

See this case
in Cookes 2.
Report, fol 23

William Warner the Father was seised in his Demesne as of fee, of the Mannor of Winton in the County of Gloucester, holden of the King by Knights-service in Capite, and being so seised, after the Marriage had betwixt William his Son and heir apparant, and Elizabeth the Daughter of Thomas Eden Esquire, in consideration of the same Marriage, and for the Joynture of the said Elizabeth, assured the said Mannor of Winton, to the use

use of the said William the Son, and Elizabeth his Wife, and the Heirs of their two bodies lawfully begotten, and died, by whose death the Reversion also of the said Mannors descended to the said William the Son, wherby he was seised therof accordingly, and being so seised, and also seised of the Mannor of Thoby, in his Demesne as of Fee holden also of the Queen by Knights-service in chief, and of certain Lands in Fobbing in the said County of Essex, which Land in Fobbing with the Mannor of Hinton, were the full third part of the value of all the Land of the said William the Son, and he made his Will in writing, wherby he devised to his said Wife Elizabeth his said Mannor of Thoby for her life, in satisfaction of all her Joynture and Dower, upon condition, that if she take to any other Joynture, that then the Devise to her shall be void, and after her decease he devised that the said Mannor shall remain to Thomas his Son, and the Heirs Males of his body, and for default of such Issue, the remainder to Thomas brother of the said William for his life, the remainder to his first, second, and third Son, and to the Heirs Males of their bodies, and so to every other Issue Male of his body, and for default of such Issue, the remainder to Leonard Barners his brother, and to the Heirs Males of his body, the remainder to Richard Barners, and the Heirs Males of his body, the remainder to the right Heirs of the Devisor: William the Son dies, having Issue Thomas his Son, and Grisell his Daughter, Wife to the said Thomas Baker; the said Elizabeth by Paroll in pais moved her Estate in the said Mannor of Hinton, and after this entred into the said Mannor of Thoby, after which the said Elizabeth died, and Thomas the Son, and Thomas the Uncle died also without Issue Male, after which the said Leonard took one Mary to Wife, and died, having Issue Anthony Barners, after which the said Mary took the said John Butler to Husband, and after this the said Anthony assigned to the said Mary the said Mannors of Thoby, in allowance for all her Dower, wherby the said John Butler as in the right of his Wife entred into the said Mannor of Thoby, wherby the said Thomas Delves by the commandment of the said Baker entred into the said Close, of which the Action is brought as in right of the said Grisell; And whether this entry were lawfull or not, was the question, which was argued in the Court, in the time of the late Lord Wray; and he, and Gawdy held strongly that the entry of the said Delves was lawfull, but Clench and Fennor held alwaies the contrary, wherupon it was adjourned into the Exchequer Chamber.

But they all agreed, that the Waiver made by the said Elizabeth by parole in pais, was a sufficient Waiver of her Estate in Hinton, and the rather, because of the Statute of 27 H. 8. cap. 10. the words of which are; That if the Joynture be made after the Marriage, that then the Wife surviving her Husband may after his death refuse to take such Joynture.

And now it was moved by Tanfield, that Judgment ought to be given for the Plaintiff, for by the Waiver of the Wife, the Inheritance of Hinton is now to be said wholly in the Husband ab initio, and therfore that with Fobbing being a whole third part of the whole Land which now is to be said to be left to descend to the Heir of the Devisor, as to Thoby; is good for the whole, and if so then no part therof descends to Grisell, and therfore the entry of the said Delves in her right is wrongfull.

Coke Attorney-general to the contrary, for he said, That it is to no purpose to consider what Estate the Devisor had in the Mannor of Hinton, by reason of this Waiver made by his Wife, Ex post facto after his death. But we are to see what Estate the Devisor had in it in the view of the Law, at the time of his death before the Waiver, and according to it the Law shall adjudge that he had power to make his Devise by means of the Statute; and at this time none can adjudge another Estate in him but jointly with his wife, of which Estate he had no power to make any disposition, or to devise it, or to leave it for the third part to his Heir, for the Statute which is an explanatory

natory Law in this point) saies, that he ought to be sole seised in such a case. And further the Statute of 34 H.8. at the end, is, that the Land which descends immediatly from the Devisoz shall be taken for the third part, and this Land did not descend immediatly, for it survived to the Wife untill she waived it, and therefore this Land is not to be taken for any third part, which the Statute purposed to have been left to the Heir, and therefore so much shall be taken from Thoby as with Fobbin shall be a third part to descend, whereby Grisell the Heir hath good right yet to part of Thoby, and therefore the entry of the said Delves in her right by commandment of her husband not wrongfull.

Periam chief Baron, Clench, Clark, Walmesley, and Fennor, That now by reason of the Waiver in the Devisoz shall be sole seised ab initio, for the said Elizabeth might have had Dowry therof, if she would, as in the like case it is adjudged in 17 E.3.6. and therefore a sole Seisin in the Husband, and the descent to the Heir in such a case upon the Waiver, shall take away the entry of him who hath right to it. And therefore the case now for the Mannor of Hinton is within the very letter of the Statute, as well for the sole Seisin which was in the Devisoz, as for the immediate descent which was from the Devisoz to his Heir, and therefore remains to the Heir for a good third part of the Inheritance of the Devisoz, by the very letter of the Statute, and if the Letter had not helped it, yet it shall be helped by the purport and intent of the Statute, which ought to be liberally and favourably construed for the benefit of the Subject, who before the Statute of Uses might have disposed of his whole Land by reason of Uses by his Will, and the Statute of 27 H.8. excludes him therof, and therefore the Statute of 32 & 34 H.8. are to be liberally expounded as to the Subject for the two parts, and the rather because it appeareth by the preamble of the Statute of 32 H.8. that it was made of the liberality of the King, and because that by 34 H.8. it appeareth that it was made, to the intent that the Subject shall take the advantage and benefit purposed by the King in the former Statute, by all which it appeareth (as they said) that the said Statutes shall be liberally expounded for the advantage of the Subject, and for his benefit, and not so strictly upon the letter of the Law as hath been moved; and so they concluded that Judgment ought to be given for the Plaintiff.

Popham and Anderson the two chief Justices, and all the other Justices and Barons held the contrary, and that Judgment ought to be given against the Plaintiff; and that by the very letter and purport of the Statutes of 32 & 34 H.8. for they said, they are to consider what Estate the Devisoz had in the Land at the time of his Devise made, without regard to that which might happen by matter Ex post facto upon the Dred of another; and if it had been demanded of any appysed in the Law, at the time when the Will was made, what Estate the Devisoz then had in the Mannor of Hinton, none is so unlearned to say, that he had other Estate in it, then jointly with his Wife: And if so, it follows that this Mannor was then out of the letter and intent of the Law, for he was not then sole seised therof, nor seised in coparcenary, nor in common, and by the words he should be sole seised in Fee-simple, or seised in Fee-simple in coparcenary, or in common: It appeareth that the intent of the Statute was, that he shall have full power of himself, without the means or aid of another, to dispose of the Land, of which he is by the Statute to make disposition, or to leave it to his Heir, and this he hath not for the Mannor of Hinton here.

And further the words of 32 H.8. are, That the Devisoz hath full power at his Will and pleasure to devise two parts of his Land so holden as here, and this is to be intended of such Land of which he then had full power to make disposition, and this he could not then do for the Mannor of Hinton.

And further the words of 34 H. 8. are that the devisiō for the parts shall be made by the Devisor or Owner of the Land by his last Will in writing, or otherwise in writing, and in default thereof by commission, &c. And can any say with reason, that it was the intent of the Statute that he shall make the Devisiō of other Lands then of those of which he then had full power to devise or to leave to his heir without any future accident to help him, or the mean of Anthony by matter Ex post facto; It is cleer that reason cannot maintain it. And the words following in the Act, which are, That the King shall take for his third part the Land which descended to the Heir of the Estate tail, or of Fee-simple immediatly after the death of the Devisor; much enforce the opinton on this side, for it cannot be said upon the death before the Waiver that this Mannor of Hinton was immediatly descended, ergo, it ought not to be taken for the third part.

And further the words are, If the Lands immediatly descended upon the death of the Devisor, &c. do not amount to a full third part, that then the King make take into his hands so much of the other Lands of the Devisor as may make a full third part, &c. wherby it is cleer, that in this case if the wife had not waived her Estate for ten years after the death of the Devisor, that for all this time the Queen could not meddle with the Mannor of Hinton, and therfore in the mean while she might well have so much of the Mannor of Thoby, which might well have made a full third part to her, and for so much which she took the Will was alwaies void, which shall never be altered nor made good by any Waiver Ex post facto. And although the Waiver of the Feme put the Inheritance entirely in the Devisor, and in his Heir, in relation to divers respects, yet as to other respects he shall not be said in them with such relation, and especially upon the Statute in which we now are to respect the power as it was in him at the time of his death, before this full Contingent.

And by Popham; If the exposition on the other side shall hold place upon the Statute, perhaps a man shall not see by the space of six years, or more, after the death of a Devisor, how his Devise shall work: As a Feoffment in Fee is made to J. S. and a Feme Covert, and their Heirs, of 10 l. Land holden by Knights-service in Capite, which J. S. hath 20 l. Land in fee so holden also; J. S. makes a Devise of his 20 l. Land, the Husband lives 60. years after; none will or can deny but that for this time the Devise is not good for two parts, now the Husband dies, and the Wife waives the Estate made to her, this puts the Inheritance thereof in the Heir of J. S. with relation to divers respects, but not to this respect to make the Will now good for the whole 20 l. Land, which therfore was void for the third part thereof, for the Will which once was void by matter Ex post facto, after the death of the Devisor, cannot be made good: And by him the descent in such a case is not such that it shall take away the entry of him who hath right, because it was not an immediate descent in Deed, but upon the operation of Law which gave Wardship and the like, but not to prejudice any third person.

And he said, that although the Queen, or other Lord upon eviction of the Land descended, or the determination of the Estate thereof, may resort to Lands devised or assured, and take a third part thereof, yet thereby the Devise or Assurance remains effectually against the Heir, but this is by a special clause in the Statute of 34 H. 8. which gives it to them, but no such remedy is given to the Devisee to help him if his part be abridged, or evicted: And the words are precise, to wit, If the part left or assigned to the King, or to any Lord, at any time during their Interest therein be evicted, &c. that they shall have so much of the two parts residue, as shall make a full third part of the remainder not evicted, &c. Wherby it appeareth, that this is given only for the benefit of the Lords, and not of the Heir, nor of the Devisee; for if after the

the Interest of the Queen, or other Lord be determined, this which was left be evicted from the Heir, it shall not be helped against the devise, but the Devise remains good to the Devisee against the Heir for the whole Land devised, whereby it appeareth, that it was the very purport and intent of the Statute, that the Devise remain as it was at the time of the death of the Devisor, without having regard to that which hapneth Ex post facto, unlesse for this point helped by this speciall clause of the Statute; and this is for the Lord and his Interest only, and for no other: And by him also clearly the Statute which is an explanatory Law shall never be taken by equity in the precise point explained to impugn the point of explanation, as here the Statute wills that the Estate of Inheritance comprised in the former Statute, shall be explained to be Fee-simple, it cannot now by any equity be, as to the power to make a Devise which is meerly given by the authority of the Statute, said to be of any other Estate then Fee-simple, of which a Devise may be made: And therfore if Land be given to another and his Heirs for the term of another mans life, a Devise cannot be made of this, because it is not an Inheritance in Fee-simple, but only the limitation of a Freehold: And where the Statute saith, having a sole Estate, we cannot by any equity, that it shall be taken of any joynt Estate, as to make any disposition of that which he had in Joynture, and therupon the greater part resolved that Judgment shall be given against the Plaintiff for the Defendants.

Southwell *versus* Ward.

4. **I**n a second deliberance between Richard Southwell Esquire, Plaintiff, and Miles Ward Abbot, by Demurrer upon the Abowry, the Case appeared to be this.

That John, Prior of the Church of Saint Faiths in Woxham in the County of Norfolk, was seised in his Demesne as of fee, in the right of his said Priory, of 8. Messuages, 300. acres of Land, 30. acres of Meadow, 60. acres of Pasture, and 200. acres of Wood, with their Appurtenances in Woxham aforesaid: And so seised, the said Prior with the assent of his Covent, by their Deed indented, shewn forth, bearing date the first day of January, 13 E. 4. and by licence of the King aforesaid, granted to William then the Master of the Hospitall of St. Giles in Norwich, and to the Brothers of the same Hospitall, and to their Successors 200. Fagots, and 200. Focalls called Astlewood, yearly to be taken of all the Lands and Tenements of the said Prior and Covent in Woxham aforesaid, by the Servants of the said Prior and Covent, and their Successors, yearly to be carried to the said Hospitall, at the costs and expences of the said Prior and Covent, and their Successors, at the Feast of St. Michael, or 20 s. of lawfull money for them at the election of the said Master and Brethren, and their Successors, to take yearly in the same Lands and Tenements in Woxham, to the use of the poor and infirm persons there being or coming: So that if it happen the said Fagots and Focalls, or the said 20 s. for them to the said Master and Freres in form aforesaid, to be arrear in all or part, &c. then they may distrain in the said Lands and Tenements, and the Distresse detain until they be fully satisfied of the said Fagots and Focals, or of the said 20 s. for them as is aforesaid, with this Proviso further, That if at any one or more times, the said Master and Brethren have chosen to have the Fagots and Focals, yet at any other time they make the 20 s. for them, and although they have taken the 20s. for them, once, or oftner, yet at any other time they may take the Fagots and Focals themselves, and that they may so vary toties quoties, and distrain for them accordingly, reasonable notice being given of their Election, in form aforesaid,

And

And the said Master and Brethren granted by the same Deed to the said Prior and Covent, and their Successors, that they or, others sufficiently warranted by them, would give sufficient notice of their election yearly, the first Sunday of April, in the Church of the said Hospital, to some Officer of the said Prior and Covent, and their Successors, if they send any thither for this cause.

By force of which Grant, the said Master and Brethren were seised of the said yearly rent of the said 200. Fagots, and 200. Focals called Astlewood accordingly, and so being seised, they by their sufficient Writing enrolled of Record in the Chancery, in the first year of the late King Ed. 6. gave and granted to the same King the said Hospitall, & all the Lands Tenements and Hereditaments of the said Hospitall; To have and to hold to him, and his Heirs and Successors for ever, wherby the said King was therof, and of the said annuall Rent seised accordingly, and so seised the 7. day of May, in the same year, the said King Edw. by his Letters Patents, bearing date the same day and year, granted the said Hospitall and the rent of the said Fagots, and Focals, and other the Premises, to the Mayor, Sheriff, Citizens, and Commons of the City of Norwich, and to their Successors for ever: and for 1600. Fagots, and 1600. Focals of the said annuall rent of 200. Fagots, and 200. Focals, being arrear at the Feast of S. Michael the Archangel, 23 Eliz. the said Ward took the Distresse, and made Conusance as Bailiff to the said Mayor, Sheriff, &c. And it was moved that the Abowry was not good, first, because it being matter of Election which was granted to the Master and Brethren, and their Successors, to wit, the Fuell, or the 20 s. it doth not appear that they ever made any election of the one, or the other, and untill it appeareth that they have made their Election to have the one or the other, it is not to be granted over by generall words: But by the dissolution of the Hospitall the grant for want of Election before is gone and determined.

And further, wheras the King made his Grant of the Hospitall, and of all the said rent of Fagots and Focals, without making mention of 20 s. for the same, it was moved that if it doth passe to the King, yet it doth not passe from him to the Mayor, &c. in as much as he granted it precisely as a Fuell, wheras it was in him as a Rent of Fuell, or of money at his Election, and therfore the King deceived in his Grant.

And further, here he hath made Conusance for the Fuell, without making mention of their Election, to have it one way, or another before the taking; but all the Court agreed that the Conusance was good, and that the return shall be awarded to him who made the Conusance: first, because that this case is quite out of the case of Election, because the rent which is granted is only out of the Fagots and Astlewood, and the 20 s. granted is not as a distinct thing, but granted as a recompence or satisfaction of that, because the Grant is of the Fagots, &c. or of 20 s. for the same; so that in such a case the Seisin of the 20 s. is a good Seisin of the Fagots and Focals, and sufficeth to maintain an Assise upon this Seisin for the Fuell, but not for the 20 s. as money paid for Suit of Court is good Seisin of the Suit: And the 20 s. here is not granted in nature of a Rent of so much, but as an allowance in satisfaction for the Fuell.

And Popham conceived, that he shall have an Action of debt for this 20 s. for the fuell, after the Election made if he will, as for a Nomine poene, because it is not the principall thing granted of which the Inheritance is, but a casuall Accident in recompence therof if he will have it, or otherwise he may distrain for it, because it is so limited to be done by the Grant it self: But they shall never have assurance of the 20 s. as a thing of Inheritance, because it is not the thing of which the Inheritance is granted, but only granted in allowance and satisfaction of it, and therfore not to be resembled to the cases where 20. quarters of Corn, or 20 s. Rent is granted to one

one and his Heirs, or other such thing which stands meerly in the disjunctive, to wit, to have, or take, the one, or the other.

And therfore suppose the Prior was to carry the fuel yearly to the Hospital at the Feast of S. Michael, and yet then the Master and Brethren might have refused the fuel, and held themselves to have the 20 s. by force of the Grant, for then originally the Election ought to have been made there: But upon the Covenant which cometh afterwards on the other part, the notice ought to have been given in April yearly before, but if it be not done, there lies but an Action of Covenant for the not doing of it, for this will not alter the nature of the Grant which was full and perfect in Law before. And here he needs not make this appearance in the Conscience, that any Election was made before the taking of the Cattel, because the Grant is of the fuel it self, and if the other had made Election before to have the 20 s. for the fuel, this ought to have been shewn on the other side in Bar of the Abowry, to wit, that he brought to them the fuel yearly according to the Grant, and that they refused it, and required the 20 s. every time for it, in which case for every such refusall and Election to have the 20 s. for it, it had excluded him to have any fuel for this year so refused.

And by Popham also, you may see a great diversity between this case, where a man is to deliver to another 20. Loads of Wood, or 20. Loads of Hay yearly out of such Land, and he does not tender them for divers years, and where a man is to take so much fuel, or Hay out of the Land of another, and he takes it not for divers years, for in the former case the party who is not satisfied shall have all the arrears, be it never so prejudiciall to the Grantor, because it was through his own default that it was not paid, but in the other case as appeareth, 27 H. 6. 10. he shall not have any remedy for the arrears for the years past, because he took them not yearly as they were due, which shall not turn the other party to prejudice, that he shall want fuel, or Hay himself, by reason of the arrears which hapned through the default of him who ought to take it, and the Judgment was given for him who made the Conscience, and it is entred in the Kings Bench, Mich. 33. & 34. Eliz. Rot. 229.

Southwells Case.

5. **A**t the end of this Term, upon the proceeding against Southwell the Jesuite, it was moved by the Attorney general to Popham chief Justice, the Master of the Rolls, Periam chief Baron, Walmsley, and Owen Justices, and Ewens one of the Barons of the Exchequer upon the form of Indictments, upon the Statute of 27 Eliz. for Jesuits, &c. If it need be comprehended in the Indictment of a Jesuite, who cometh into the Realm of England, or any Dominions of the Queen, or shall be taken therein 40. daies after the end of this Session of Parliament, that if he doth not submit himself within three daies of his landing, if he cometh in after the 40. daies according to the Proviso of the Statute, or that he was not so infirm of his body (where he came in before the 40. daies) that he was not able to passe out of the Realm by the time prescribed at first, because that it is comprised in the body of the Act, that it shall not be lawfull for any Jesuite, &c. being born within this Realm, or any other the Queens Dominions, & made after the Feast of S. John Baptist, in the first year of her Reign, or after this to be made by any authority derived, &c. from the See of Rome to come, be, or remain in any part of this Realm, &c. otherwise then in such speciall cases, and upon such speciall occasions, and for such time only which is expressed in this Act, and if he does, that this offence shall be adjudged high Treason &c.

And after deliberation taken, and consideration and conference amongst themselves had, they all resolved that the better course was to omit this in the Indictment, notwithstanding it be comprised in the body of the Act in the same manner as if it had been only in a Proviso; in which case it is to the Prisoner to help him by means of such a Proviso, if he can do it: for the words (other then, &c.) are but as referring to the provision subsequent in the Statute, in which case this matter shall be used but as the Proviso it self shall be; and according to this it hath been commonly put in practise by all the Justices in all places after the Statute untill now.

And they agreed also, that it need not be shewn whether he were made a Jesuit, or Priest, &c. either beyond Sea, or within the Realm, because whersoever it was, it is within the Law if he were made by the pretended authority of the See of Rome.

But they agreed that it ought to be comprised in the Indictment that he was born within this Realm, or other Dominions of the Queen, but need not to shew where, but generally, *Et quod J. S. natus infra hoc Regnum Angliæ, &c.* And the Indictment ought to comprise that he was a Jesuite, or Priest &c. by authority challenged or pretended from the See of Rome, because that this is in the body of the Act, without such reference as in the other point, and according to this resolution the proceeding was against the said Southwell.

Easter Term, 37 Eliz.

Pigots Case.

I. **A**fter the death of Valentine Pigot Esquire, a Commission was awarded in nature of a Mandamus, and after the death of Thomas Pigot Father of the said Valentine, a Commission was awarded in nature of a *Diem clausit extremum*, and the said Commissions were awarded to one and the same Commissioners, who by one Inquest took but one Inquisition upon these severall Commissions in this form.

Inquisitio indentata capta apud, &c. virtute Commiss. in natura brevis de diem clausit extremum eisdem Commiss. direct. &c. ad inquirendum post mortem Thomæ Pigot, Ar. nuper defuncti patris predict. Valentin. per sacramentum, &c. Qui dicunt, &c. After which all the points of the Commission after the death of the said Valentine are enquired of; but for the Commissions after the death of the said Thomas Pigot, it is imperfect in some points, as who is his Heir, &c. is not found.

And by Popham and Anderson, this Inquisition is void as to Valentine as well as for Thomas, for their authorities which are the Commissions are by severall Warrants which cannot be simul & semel by one and the same Inquisition executed and satisfied, but ought to be divided and severall, as the Warrant is severall, and yet the same Inquest which found one Inquisition by one Warrant, may also find another Inquisition by the other Warrant, but divided and severall, and not as one, for as it is made it does not appear upon which of the Commissions the Inquisition as to Valentine is taken, for as it is made it may be as well upon the one as upon the other, for it is said to be by virtue of both the Commissions, which cannot be, and therefore is not good in any part, and severall Warrants ought to be severally executed, and therefore although the Escheator as appeareth by 9 H. 7. 8. may take an Inquisition *Virtue officii*, and at the same day another Inquisition, *Virtue brevis* by one and the same Inquest, yet this cannot be drawn into one

one Inquisition: And that which is found Virtute officii contrary to that which befoze the same day Virtute libris, as that it found moze Land, is good for the King. And this their opinion was certified to the Court of Wards.

Sir Rowland Haywards Case.

1. **T**his Case was also sent to the same chief Justices out of the Court of Wards: Sir Rowland Hayward being seised in his Demesne as of Fee, of the Mannors of D. and A. in the County of Salop, and of other Lands in the same County, part whereof were in Lease for years by severall Indentures, rendzing certain rent, part in the possessions of severall Copyholders, and part in Demesne in possession out of Lease, by Indenture dated 2. September, 34. Eliz. made mention that this was for, and in consideration of a certain sum of money to him paid by Richard Warren Esquire, and others, demised, granted bargained and sold to the said Richard Warren and the others, the said Mannors, Lands, and Tenements, and the Reversion and Remainder of them, and of every part of them, and the Rents and Profits reserved upon any Demise thereupon for 17. years, next ensuing the death of the said Sir Rowland, rendzing a Rose at the Feast of S. John Baptist yearly, if it be demanded, which Deed was acknowledged to be enrolled, and afterwards by another Indenture covenanted and granted for him and his Heirs, hereafter to stand seised of the said Mannors, Lands, and Tenements, to the use of the said Sir Rowland, and of the Heirs Males of his body, and afterwards and befoze any Attornment to the said Richard Warren and his Co-lessees, or any of them, the said Sir Rowland died seised of the said Mannors, Lands, and Tenements, leaving a full third part of other Lands to descend to his Heir.

See this case in Coke 2. Report 35.

And it was moved on the Queens part, that for part, to wit, for that which was in possession it pass to the said Richard Warren, and the other by way of Demise at Common Law, and therfore it doth not passe afterwards by way of Bargain and Sale as to the Remainder, and that therfore for the Services of the Mannors, and for the Rents reserved upon the Demise, these remain to the Heir who was in Ward to the Queen, and within age, and therfore to the Queen by reason of the Tenure which was in Capite by Knights service.

But by Popham and Anderson it is at the Election of the said Richard Warren and his Co-lessees to take it by way of Demise, or by way of Bargain and Sale, untill that by some act done, or other matter, it may appear that their intent is to take it another way, for the Use in this case may well passe without the Inrolment of the Deed, because the Statute of 27 H. 8. of Inrolments, extends but to where a Freehold is to passe, and the Use so passing, this shall be executed by the Statute of 27 H. 8. of Uses, and therfore if the said Richard Warren and his Co-lessees after the death of the said Sir Rowland Hayward, would elect to take it by way of Bargain and Sale, they shall have all the Reversions, Remainders, Rents, and Services, as well as the Land in possession executed to them by the Statute of Uses: And of the same opinion were all the Justices in Trinity Term following, upon their meeting at Serjeants-Inne for another great cause.

Trinity Term, 37 Eliz.

where a Justice of Peace bails one who is notailable, he shall be fined, and albeit he be committed but for suspicion of Felony, and hath no notice of his offence.

1. **V**pon an Assembly of all the Justices and Barons of the Exchequer at Serjeants-Inne in Fleetstreet, this Term it was resolved by them, and so agreed to be hereafter put in execution in all Circuits; That if a man taken for Felony be examined by a Justice of Peace, it appeareth that the Felon is notailable by the Law, and yet the Justices commit him to Goal but as upon suspicion of Felony, not making mention for any cause for which he is notailable, whereby he is brought before another Justice of Peace, not knowing of any matter why he ought not to be bailed, wherupon they bail him, these Justices ought to be fined by the Statute of 1. & 2. Phil. & Mar. for they offend if they bail him, who by the Statute of Westm. 1. is notailable, and therefore they at their peril ought so to inform themselves before the bail taken of the matter, that they may be well satisfied that such a one isailable by Law, ; and therefore observe well the Statute of Westm. 1. cap. 18. who isailable, and who not by the Law. And it seems that no Justice of Peace could have bailed any one for Felony before the Statute of 1 Rich. 3. cap. 3. which is made void by 3 H. 7. cap. 3. for before this he ought to have been bailed by the Sheriff, or other Keeper of the Prison where he was in Ward, or by the Constable, and by no other Officer, unlesse Justices of the Kings Bench, Justices in Eyre, or Justices of Goal-delivery.

Herbin *versus* Chard, and others.

2. **I**n Trespasse by William Herbin Plaintiff, against Chard and others Defendants, for a Trespasse made at Pynon Farm in Netherbury and Loder, in the County of Dorset, the Case upon the Demurrer appeared to be this.

The Lord Mozdant was seised of the Farm, in his Demesne as of Fee, and so seised, demised it to Philip Fernam, Elizabeth his wife, and John Fernam the eldest Son of the said Philip, for term of their lives, and of the Survivor of them, and the said Elizabeth died, after which the said Philip his Father demised his part of the Farm by his Deed indented, dated 13. Mart. 32. Elizabeth to Philip his Son, and Toby Fernam his Son, for eighty years, immediately after the death of the said Philip the Father, if the said John Fernam shall so long live, with divers remainders over for years, depending upon the life of the said John, after which the said Philip the Father died, and John survived him, and demised the said Farm to the Plaintiff, upon whom the Defendants entred in right of the said Philip and Toby, and whether their entry were congeable, was the question: And it was moved by Goodridge of the Middle-Temple, that the entry of the Defendant was not lawfull, because the said John was now in by the Lessor, and not by his joynnt Companion.

And further, he had no power to dispose thereof beyond his own life; for suppose that he makes a Lease thereof for years, and afterwards grant over his Estate to a Stranger, and dies, the Lease for years is thereby determined, albeit his joynnt Companion be yet living, and that his Estate continues.

And yet he agreed, that if had made a Lease for years, to begin at a day to come, as at Michaelmas following, or the like, that this had been good, for it is an Interest in the Grantee to be granted over for the presumption, that it might be executed in his life; but in the other case there is not any possibility, that he who hath not but for his life, can demise it to begin after the Estate made to him is determined.

But

But on the other part, it was moved that the Demise remains in force for the life of the said John, for at the first every one had an interest for the life of the other also, and therefore if one Joint-tenant for life make a Lease for years in possession, and dies, the Lease yet continues.

And Crook the younger alledged, that it was adjudged at last Hartf. Term, If a man possessed of a Term for years in right of his Wife, makes a Lease for years of the same Lands to begin after his death, & dies during the Term, without other alteration of it, and the Wife survives him, that now the Lease made by the Husband, is good, and that the like case as this, by the opinion of Clench and Walmley was decreed to be good in the Chancery.

Arton *versus* Hare

3. **I**n a second deliberance between Francis Arton Plaintiff, and Henry Hare Abbotwant, the case appeared to be this.

William Cocksey Esquire, was seised in his Demesne as of Fee, of the Mannor of Wolverton in the County of Worcester, and so seised in Octab. Mich. 7 Eliz. levied a Fine of the said Mannor to certain persons, to the use of the said William and Alice his Wife, and the Heirs of William, untill a marriage had between Martin Croft, and Anne Wigstone, and after this marriage to the use of the said William and Alice his Wife, and the Heirs of the body of the said William, and for default of such Issue, to the use of the said Martin Crofts and Anne, and the Heirs Males of the body of the said Martin upon the body of the said Anne begotten, untill the said Martin should go about to alien, sell, grant, or give the said Mannor, or any parcell thereof, or to suffer any Recovery, or levy any Fine thereof, or make any discontinuance, &c. And after the Estate of the said Martin and Anne, and of the Heirs Males of their bodies to the Premisses, by any such attempts determined and finished, then to the use of the said Anne for her life, and after, to the use of the Heirs Males of the body of the said Martin upon the body of the said Anne lawfully begotten, and for default of such Issue, to the use of the Heirs of the body of the said Martin, and for default of such Issue, to the use of Giles Croft brother of the said Martin, and the Heirs Males of his body, untill, &c. as before, and after to the use of the Heirs of the body of the said Giles, and for default of such Issue, to the use of Edmund Crofts, the third brother of the said Martin, and of the Heirs Males of his body, as is before limited to the said Giles, with remainders over, afterwards the marriage was had between the said Martin and Alice, after which the said Martin and Giles died without Issue, without any thing done by the said Martin to determine his Estate, or by the said Giles to determine his Estate, if any had been.

And it was agreed by all the Court, that as this case is, no remainder can enure over to the said Giles, without an attempt precedent by the said Martin to determine his Estate, because the Estate of Giles is not limited to begin but upon such an attempt precedent.

And in the same manner Edmund shall have nothing untill the Estate of Giles determine by some attempt made by him, if the said Giles had an Estate, because the Estate of Edmund depends upon the attempt made by Giles precedent to it, which not being done, the Estate of Edmund never happened to be; and therefore he who cometh in under a Discontinuance made by the said William Cocksey, after the death of Martin and Giles without Issue, notwithstanding the Remitter of the said Alice in the case, is to have the Land against those who come in by the said Edmund, and upon this point only Judgment was given accordingly in the Kings Bench,

Grenningham *versus* the Executors of Heydon.

4. **I**n Debt upon an Obligation of 200. marks by Richard Grenningham Plaintiff, against the Executors of one Ralph Heydon Defendants, the case appeared to be this upon Demurrer.

The said Heydon was bound to the Plaintiff in 200. marks, the Condition whereof recites, that whereas the said Heydon had received of the said Grenningham 76 l. 6 s. 8 d. before the date of the said Obligation of 200. marks in payment and satisfaction of certain Obligations and Bills of debt, remaining in the hands of the said Heydon, and specified in the Condition what they were in certain, and the which said Bills & Obligations the said Heydon is to deliver, or cause to be delivered to the said Grenningham, his heirs or assigns, before the Feast of S. Michael, next ensuing the date of the said Obligation, or otherwise the said Heydon, his Executors, Administrators, or Assigns, or some of them before the same Feast, shall make, or cause to be made and delivered to the said Plaintiff, his Heirs and Assigns, such good and sufficient Acquittances for the payment of the said sums of money formerly mentioned, as the said Plaintiff, his Heirs, Executors, or Assigns, shall devise, or cause to be devised by the Counsel of the said Plaintiff, his Heirs or Assigns, before the Feast, without fraud or deceit, that then the said Obligation shall be void, &c.

And before the Feast the said Plaintiff did not devise any acquittance; whether now the Obligation be saved by the Disjunctive, without devising the Obligations, and Bills before named, before the Feast of S. Michael: Rot. 36, & 37.

Eton and Monney *versus* Laughter.

See this Case
Coke lib. 5. 21.
by the name
of Laughters
case.

5. **I**n Debt upon an Obligation of 400 l. by Thomas Eton, and Roger Monney Plaintiff, against Thomas Laughter Defendant, who was bound together with one Richard Rainford to the said Plaintiffs, the Condition of which Obligation was,

That if the said Richard Rainford after marriage had between him and Jane Gilman Widow, together with the said Jane, alienate in Fee, or Fee-tail, all that great Messuage of the said Jane in London, in the Tenure of William Fitz Williams Esquire, if then the said Richard Rainford in his life time purchase to the said Jane, her Heirs and Assigns, Lands and Tenements, of good Right and Title, and of as good value as the money raised upon the alienation of the said Messuage amounts unto, or leave to the said Jane after his decease, as Executrix, or by Legacy, or other good assurance, so much money as he shall receive or have upon the said Sale, that then the Obligation shall be void, after which the said Richard Rainford married with the said Jane, and the said Richard and Jane sold the said Messuage in Fee by Fine, for 320 l. received by the said Richard Rainford, after which the said Jane died, no Lands being purchased to the said Jane by the said Richard, and the said Richard yet living.

Michaelmas

Michaelmas Term, 37, & 38. Eliz.

Sawyer *versus* Hardy.

1. **I**n an Ejectione firmæ, by Christopher Sawyer Plaintiff, against Edmund Hardy Defendant, for a Messuage in S. Martins, upon a Demurrer, the case was this.

A Lease was made of the said Messuage to one Margaret Sawyer for 40. years, upon Condition, that if the said Margaret should so long continue a Widow, she should dwell and stay in the same Messuage, the said Margaret continued a Widow, and dwelt in the same house all her life, and died during the said Term of 40. years, making the Plaintiff her Executor, and by award the Plaintiff had Judgment to recover: For by Popham, Gawdy, and Clench, this now was no Condition nor Limitation, for it hath no certain conclusion upon the (that if) to wit, that then the Term shall continue, or that she shall pay so much, or otherwise what the conclusion shall be, none can imagine: As if such a Lease be made upon condition, that if the Lessee does such a thing without other conclusion, it is a good Lease for 40. years, for none can imagine what the conclusion shall be in such a case, or that then the Lease shall be void, or that he shall re-enter, or that the Lessee shall forfeit so much, or what shall happen upon it, for which incertainty it shall be taken as a void Clause.

But by Popham, if it had been Sub conditione si tamdiu vixerit, it had been good to determine the Lease, but it is otherwise of the word (quod si) for the incertainty as before.

And they all agreed, that if the Lease had been for 40. years Si tamdiu sola viveret & inhabitaret in eodem Messuagio, that the Lease had been determined by her marriage, or death. In the same manner, as if it had been Si tamdiu vixerit. And so in truth had been the case if it had been well pleaded, but by pleading the advantage thereof was lost, and the truth not disclosed.

But by Popham, If a Lease be made for 40. years, if he shall dwell in the same for his life, there it is good for 40. years, upon performance of the Condition, the diversity appeareth, to wit, where it is, if he shall dwell there during the Term, and where it is, if he shall inhabit there during his life.

Goodale *versus* Wyatt.

2. **I**n an Ejectione firmæ by Cuthbert Goodale Plaintiff, against John Wyatt Defendant, for a Meadow in Aylesbury, in the County of Buck. called Diggelmore, upon a speciall Verdict the case was this.

Sir John Packington Knight, enfeoffed thereof one Ralph Woodliff, to have and to hold to him and his Heirs, upon condition, that if the said Sir John within a year after the death of the said Ralph, pay to the Heirs, Executors, or Administrators of the said Ralph, the summ of a 100. marks of lawfull money, that then the said Feoffment and Seisin made thereupon shall be void; Ralph Woodliff made a Feoffment over to others thereof, and died intestate, and Administration was committed to Anne his Wife, and Drew Woodliff his Son and Heir, who gave a Warrant of Attorney to Thomas Goodale then seised of the said Meadow by mean conveyances, for the receipt of the said 100. marks, with Covenant that none of them shall do any act, or thing that shall be prejudiciall or hurtfull to the said Thomas Goodale, for the receiving and enjoying of the said summ, after which it was certified to the said Sir John Packington by the

See this Case
Coke lib. 5. fol.
95, 96: by the
name of Good-
ales case.

the said *Goodale* that this Warrant was made to him: After which it was agreed between the said *Sir Iohn Packington & Drew Woodale*, that the said *Tho. Drew* shall have but 32 l. of the said 100. marks, wherupon the said *Sir Iohn Packington* within a year after the death of the said *Ralph Woodliff* paid to the said *Drew Woodliff* the 100. marks, and presently the said *Drew* delivered to the said *Sir Iohn* all the 100. marks but 32 l. And the Verdict stands upon this point, whether the 100. marks were well paid, or not.

And by *Popham* and *Gawdy* this was meerly a fraud which shall never prejudice a third person, for if it be agreed between the Disseisee and I. S. that a stranger shall disseise the Tenant of the Land, and enfeof the said I. S. to the intent that the Disseisee shall recover against him, this Recovery shall bind the said I. S. but not him who was disseised, and yet he who recovered had a good Title, and paramount the other, but he shall not come to that to which he had good cause of Action and Title by fraudulent means, to the prejudice of a third person, not party to this fraud.

And it was said further, that to pay money, and take it away again presently before that it is purged up by re-delivery, is not properly a payment, but rather a colour of payment.

And by *Fennor* and *Popham*, the force of a Deed of Feoffment once effectual, cannot become void or of no effect, nor the Liberty thereupon by such manner of words. And it is not like a Bargain of Goods, or an Obligation, or a Lease for years, which by such words may be dissolved and made to be of no force or effect, because that as by the sealing a bare Contract, it may be made perfect and effectual without other circumstances, so may it be defeated by such bare means without other circumstance: But so it is not in case of an Inheritance or Freehold, which cannot be effectual by the bare delivery of a Deed, unless that Liberty be made thereupon.

And all agreed, that as this case is, notwithstanding the Feoffment made over by the father, the money might have been paid to the Heir to perform the Condition, if they had been duly paid, and without Cobin, and that the words had been apt to have defeated the Estate.

In which case a Condition shall be performed to an Assignee, and not to the Heir.

But by *Popham* and *Clench*, If a Feoffment be made to one upon condition of payment of money to the Feoffee, his Heirs or Assignes and the Feoffor makes a Feoffment over, and dies, the money ought to be paid to the Feoffee who is the Assignee, and not to the Heir, for there (Heir) is not named but in respect of the Inheritance which might be in him, but here he is named as a meer stranger to it.

Bartons Case.

3. **I**n a Writ of Error sued in the Kings Bench by *Randall Barton*, upon a Fine levied at *Lancaster*, 7 Eliz. of Land in *Smithall*, and else where in the County of *Lancaster*, by *Robert Barton Esquire*, to *Leven and Brownde*, where this Writ was brought by the said *Randall* as Heir in tail to the said *Robert*, to wit, Son of *Ralph*, Brother of the said *Robert*. The Defendant plead a Recovery in Bar thereof had after the Fine, in which the said *Robert* was vouched, who vouched over the common Vouchee: And by all the Court this common Recovery with such double Voucher (which is the common assurance of Lands) is a Bar by reason of the Voucher, to every manner of right which the Vouchee, or his Heir by means of him is to have to this land, which is paramount the Recovery. And so it is of every manner of way whereby they are otherwise to come to the Land before the Recovery. And if the recovery be erroneous, it remains a good Bar untill it be avoided by error. But if the Recovery be void, or the Voucher not warranted to be

be, pursuing the appearance of the Tenant, but precedent to it, as was pretended, and so no Tenant to warrant the Voucher when the Voucher was made, the Recovery shall be no bar in such a case; and the case here was informed to be this, for the Writ of Entry bears date 1. Mart. 7 Eliz. returnable Die Lunæ in 4. septimana quadragesimæ propter futur. and the Voucher was made in 4. septimana quadragesimæ, 7 Eliz. the said first day of March, being the first week of this Lent, 7 Eliz. And upon this it was inferred that the Tenant was not to appear untill Sunday in the fourth week of Lent, 8 Eliz. which is a long time after that the Voucher appeared and vouched over.

But by the whole Court the Original Writ shall be taken as it is written, to be returnable on Monday, in the fourth week of the same Lent, 7 Eliz. for it shall be taken as it is written shortly, most beneficially that it can be to make the Recovery good. And if it had been written Proxime, it should refer to the week before, and so good. And if the word (Futur.) had been written at large (Futura) it also shall refer to Septimana, and therefore being written briefly it shall refer as it may best do to make the Recovery good. But if it had been in Quarta septimana proximæ quadragesimæ at large, then the word Proxime shall refer to Quadragesimæ because of the case: But if it had been Proxima it shall refer to Septimana, because also of the case; But here as the case is, it shall be a good reference to make the words Tunc proxima futur. to shew what fourth week of Lent, to wit, that next ensuing the first day of March. As if a man be bound by Obligation, bearing date the first day of March, to pay the 10. day of March then next ensuing, this shall be taken the 10. day of this March, because this is next ensuing the first day.

Paramor *versus* Verrald.

4. **I**n Trespasse of Assault and false Imprisonment, by Robert Paramor against John Verrold, and others, supposed to be done at such a Parish and Ward in London, the 20. day of May, 35 Eliz. The Defendants justify by reason of an Execution upon a Recovery in the Court of Sandwich, within the Cinque Ports, Debt, and traverse Absque hoc, in that they were guilty in London, &c. The Plaintiff reply and maintain the Assault and Imprisonment, as it is said, and traverses Absque hoc quod habetur aliquod tale Recordum loquelæ prout, the Defendants have alledged, Et hoc paratus est verificare per Recordum illud, and upon this the Defendants demurred in Judgment: And per Curiam the Defendants plea Prima facie was good, because it was a speciall manner of Justification, which cannot be pleaded and alledged to be in any other place then where it was done, in the same manner as if they had justified by force of a Capias directed to the Sherif of another County, then where the occasion brought, or by Warrant of a Justice of Peace of another County, for matter of the Peace, and the like, which are not like to the case of Partridge, who was beaten in the County of Gloucester by Sir Henry Pole, for which he brought his Action in London: And Sir Henry Pole would have justified by Assault of the Plaintiff in the County of Gloucester, with a traverse that he was not guilty in London: But it was then ruled in this Court, that he could not do it to oust the Plaintiff to sue in London, but in such a case he might have alledged that the Assault was done in London, because it was also a thing transitory, of which they shall take notice there, and so help himself if the matter had been true.

But in the case at the Bar, if the speciall matter alledged in the forraign County be false, as here, the Plaintiff may maintain his Action and traverse the special matter alledged by the Defendant: And so a traverse in such a case may be upon a Traverse when falsity is used, to oust the Plaintiff of that benefit which the Law gives him.

Hillary Term, 38 Eliz.

Wood *versus* Matthews.

1. **I**f a writ of Error brought by Owen Wood, against Griffith Matthews, upon a judgment given in the common Pleas, the case was briefly thus. The Issue in the Common Pleas was, whether one were taken by a *Cap. ad satisfaciendum*, or not, and upon the trial thereof at the *Nisi prius*, the Jury found for the Plaintiff in this Action, to wit, that the party was not taken by the said *Capias*, and upon the back of the Pannell entred *dicunt per Quer.* but on the back of the *Postea* the Clark of the Assises certified the Pannell thus, to wit, That the Jury say, that no *Capias* was awarded, which was otherwise then was put in Issue, or found by the Jury; and the Roll of the Record was according to the *Postea*, and upon this Judgment given for the said *Matthew* then Plaintiff, upon which (amongst other Errors) this variance between the Issue and Verdict was assigned for Error, and after deliberation had upon this point, and this matter alledged by the Defendant in the Writ of Error, and certified out of the Common Pleas, the Court awarded as to this point that the Record sent up out of the Common Pleas by the Writ of Error, shall be amended, according to that which was endorsed on the back of the Pannell, for the endorsement upon the Pannell is the Warrant for the certifying of the *Postea*, and so this Warrant over to him that makes the Entry in the Roll: And therfore whereas it was alledged that the *Postea* was amended in the Common Pleas after the Record removed, it was holden to be well done there; for although the Record were removed by the Writ of Error, yet the *Nisi prius*, the *Postea*, and the like remain still there, as it is of the Warrant of Attorney, and the like: And if the *Postea* had not been amended there, but sent up with that which was endorsed upon the Pannell, all shal be amended here according to that which was indorsed upon the Pannell, and according to this there was a *Precedent* shewn Tr. 35. H. 8. between Whitfeild and Wright, where the Issue was, whether a quantity of Grain were delivered between two feasts, and endorsed upon the Pannell (*Dicunt pro quer.*) and yet the *Postea* certified (and the Rolls also made) that the delivery was made *ad festa*, and upon this matter alledged in Banco Regis, and the Error in this point assigned and certified out of the Common Pleas, the Record removed by the Writ of Error was by award of the Court amended, and the word (*Ad*) razed out, and the word (*Inter*) written in lieu of it, according as it appeareth it ought to have been by the *Pote* upon the back of the Pannell. And the like amendment was made lately in the Chequer Chamber, upon Error brought there upon a Judgment given in Banco Regis, where the Indorsment upon the back of the Writ was (*pro Quer.*) and the *Postea* and Roll was, that the Plaintiff was guilty, and there amended the last Term.

Slanings Case.

2. **N**icholas Slaning of Bickley was seised in his Demesne as of Fee, of the Mannor of Bickley, and of a Mill in Walkhampton, in the County of Devon, called a blowing Mill, and of another Mill there called a knocking Mill, and of an acre of Land there also, and of divers other Mannors and Lands in the said County of Devon, the said Mills and acres of Land in Walkhampton, then being in the possession of one Peterfeild, and Atwill, of an

an Estate for divers years then to come, and being so seized, he with Margaret his Wife levied a Fine of the said Mannor of Bickley, and of other Lands, omitting the said Lands in Walkhampton, to certain Conuzees, who rendered the same back again to the said Margaret Slaning for her life, with the remainder over to the said Nicholas, and his Heirs: After which the said Nicholas by Indenture dated 30. Octob. 21 Eliz. gave and enfeoffed all the said Mannors and Premises to John Fits and others, and the Heirs of the said Fits, to the Uses, Provisions, and Limitations mentioned in the said Indenture, which was to the use of himself, and the Heirs Males of his body, by any other Wife, the remainder to Nicholas Slaning of Newton Ferries, and the Heirs Males of his body, with divers remainders over, with this Proviso, to wit, Provided, and it is the intent of these presents, and of the parties therunto, that the said John Slaning, and the Heirs Males of his body, or the said Nicholas Slaning of Newton-ferries, and the Heirs Males of his body, in whomsoever of them the Inheritance in tail of all the Premises shall happen to be by force of these presents, shall pay to Agnes the Daughter of the said Nicholas Slaning of Bickly, 200 l. or so much thereof as shall be unpaid at the time of the death of her said Father, according to the intent of his last Will, with a Letter of Attorney to it, by which he ordains John Hart and Robert Fort, jointly and severally his Attorney to enter into the said Mannor of Bickley, Walkhampton, &c. and all other the Lands, Tenements, and Hereditaments, in the said Indenture mentioned, and possession for him to take, and after such possession taken for him and in his name, to deliver full possession and seisin of the Premises to the said John Fits, &c. according to the form and effect of the said Indenture, whereupon possession and seisin was given of all but that which was in possession of the said Peterfield and Atwill: And the said Peterfield and Atwill, nor either of them never attorned to the said Grant: After which Nicholas Slaning of Bickly made his last Will, by which devised to the said Agnes his Daughter 200 l. to be paid in form following, and not otherwise, to wit, 100 l. thereof, in these words, On that day twelvemonth next after the day of his death, and the other 100 l. that day twelvemonth next after, &c. and made the said John Slaning his Executor, and afterwards, to wit, the 8. day of April, 25 Eliz. died without Issue Male of his body, the said Agnes took to Husband one Edmund Marley, and upon the 8. day of April, 26 Eliz. the said John Slaning paid the first 100 l. to Agnes then being living, and upon the 8. and 9. dates of April, 27 Eliz. Nicholas Slaning of Plumpton, Son and Heir of the said John Slaning, who died (in the mean time) an hour before the Sun set, and untill the Sun was set, came to the House where the said Edmund and his Wife inhabited in London, and tendered the last 100 l. and that neither the said Edmund nor Agnes his Wife were there to receive it, but that the said Edmund voluntarily absented himself, because he would not receive the 100 l. and that thereupon the Wife of the said Edmund died, having Issue two Daughters, the Lands being holden by Knights-service in Capite, and the said Daughters being yet within age, and all this being found by Office, by the opinions and resolutions of Popham and Anderson, and the rest of the Council of the Court of Wards, the said Heirs now in Ward shall have nothing but that which doth not passe by the conveyance to John Fits and his joint Feoffees, which was only that which was in the possessions of Peterfield and Atwill, and that the Livery was good of the rest, albeit the Attorney did nothing of that which was in Lease, notwithstanding the words of the Warrant, that they should enter into all, and then shall make the Livery.

And they agreed, that the Condition doth not bind neither the said John Slaning nor Nicholas his Son, because they had not all the Land according to the

the purport of the Condition, which was, that he who had all thereof should pay the 200 l. whereas here that which was in the possession of Peterfeild and Atwill did not passe to them for want of Attornment, for a Condition ought to be taken strictly.

And further the payment was referred by the Indenture to be according to the Will, or by the Will, and the 200 l. was devised as a Legacy, which ought to be paid but upon demand, and not at the peril of the Executor, and therefore the nature of the payment of it is altered by the intent of the Will, and being not demanded, there is no default in the said Nicholas Slaving of Plumpton, to prejudice him of his Land, if it had been a Condition, for then it shall be but a Condition to be paid according to the nature of a Legacy upon demand, and not at the peril of the party. And whether the word twelve month shall be taken for a year, or twelvemonths, according to 28. daies to the month, as it shall be of eight or twelve months, or the like. And they agreed that in this case it shall be taken for the whole year, according to the common and usuall speech amongst men in such a case, and according to this opinion Wray (who is dead.)

Anderson and Gawdy made their Certificate to the late Chancelor Sir Christopher Hatton, in the same case then being in the Chancery, and a Decree was made accordingly.

And many were of opinion, that by his absence, by such fraud he shall not take advantage of the Condition, being a thing done on purpose, if it had been to be performed at his peril.

Kellies Case.

William Kelly and Thomasine his Wife, were seised of certain Lands in S. Eth, in the County of Cornwall, called Karkian, to them and to the Heirs of their two bodies between them lawfully begotten, by the Gift of one William Dowmand Father of the said Thomasine, 11 H. 8. a long time after which Gift, to wit, 25 H. 8. A Fine Sur conuſance de droit come ceo que il ad per, was levied by Peter Dowmand, Son and Heir of the said William Dowmand to William Kelley of the Mannor of Dowmand, and of a 100. acres of Land, 300 acres of Meadow, 300. acres of Pasture, and a 1000. acres of Furze and Heath in Dowmand, S. Eth. Trevile, and divers other Towns named in the Fine, who rendred the same back again to the said Peter in full, with diverse Remainders over, and this Fine was with proclamations according to the Statute, after which the possession of Karkian continued with Kelly and his Heirs, according to the first Intail; and the Mannor of Dowmand, and the Remainder of the Lands in these Towns, which were to the said Peter Dowmand to him and his Heirs according to the render, untill nine years past, that by Nisi prius in the Country upon the opinion of Manwood late chief Baron, the Land called Karkian, was recovered against the Heir of the said William Kelly, by virtue of the said Fine and Render, because all the Land which the said Peter Dowmand, and the said William Kelly also had in all these Towns named in the Fine, were not sufficient to supply the Contents of acres comprised in the said Fine: And what the Law was in this case, was referred to the chief Justices, the Master of the Rolls, Egerton, and the now chief Baron out of the Chancery, who all agreed upon all this matter appearing, that nothing shall be said to be rendred but that which indeed was given by the Fine. and Karkian does not passe to the said William Kelly by the Fine, for as to it the Fine is but as a release of Peter to him, and therefore shall not be said to be rendred to the said Peter by the Fine, where no matter appeareth, whereby it may appear that it was the intent of the parties that this shall be rendred. And therefore Popham said, that by so many Fines which have been levied in such a manner, and to such who have Land in the same Towns where the Conuſance hath been (considering

ing that alwaies moze Land is comprised in Fines by number of acres, then men have, or is intended to passe) by them at some time, or in some age, it would have come in question if the Law had been taken as Manwood took it, but in all such cases the Possession hath alwaies gone otherwise, which shewes how the Law hath been alwaies taken in such cases.

And therfore if a man be to passe his Mannor of D. to another by Fine Executory, and he leby the Fine to him by the name of the Mannor of D. and of so many acres of Land in D. and S. being the Towns in which the Mannor lies, after which the Conuzor purchaseth other Lands in these Towns, the Fine befoze the Statute of Uses shall not be executed of these Lands purchased after the Conufance, and the Fine shall work to these which he had power and intent to passe, and no further.

And it seemed to them, that an Use may be averred without Deed upon a Fine sur Render. And all agreed that if there had been a Deed to have declared the purport of the Fine, that the Fine shall not be taken to extend further then is comprised in the Deed. And what is the cause therof, the Deed or the intent of the parties: and none can say but that it is the intent of the parties, and not the Deed, and the intent may as well appear without the Deed, as with it, albeit it be not so conclusive by Parole as by Deed.

And therfore suppose I have 100. acres of Land in a Close in D. and I. S. hath another 100. acres in the same Close and Town, and I. S. hath a 100. acres of Land in the same Town out of this Close, and my intent is to leby a Fine to I. S. of the whole Close by the name of 200. acres of Land, with a Render as befoze, and I leby it accordingly, shall the Render enure to the Land, which I. S. had in the same Town: It is cleer that it shall not, although it be without Deed: why then shall the Fine here be taken to work rather to the Land called Karkian, then to any other Lands which any other had in the same Towns, when it appeareth plainly, that it never was the intent of the parties, that the Fine should extend to these Lands called Karkian, and it was decreed in Chancery accordingly.

Hall *versus* Arrowsmith.

4. **I**n the case between Hall and Arrowsmith, it was agreed by the whole Court in the Kings Bench, That if a Copyholder for life hath licence to make a Lease for three years, if he shall live so long, and he makes a Lease for three years without such a Limitation, that yet this is no forfeiture of his Estate, because the operation of Law makes such a Limitation to the Estate which he made, to wit, that it shall not continue but for his life, and then such an expresse Limitation in the case where the Law it self makes it is but a meer trifle; and yet if a Lessee for life makes a Lease for years, and he in the Reversion confirm it, it remains good after the death of the Tenant for life, but this then shall be as if it had been made by him in the Reversion himself, and shall be his Lease: But if the Lease there had been made determinable upon the life of Tenant for life, the confirmation therof by him in the Reversion will not help him after the death of him who was Tenant for life, *Causa patet.*

But in the principall case, if the Copyholder had had an Estate in Fee by Copy, it had been a forfeiture of his Estate to make an absolute Lease, because in that case he does moze then he was licensed to do.

And they agreed that such a licence cannot be made to be void by a Condition subsequent to the execution thereof, to undo that which was once well executed. But there may be a Condition precedent united to it, because in such a case it is no licence until the Condition performed; but the licence before mentioned is not a conditionall licence, but a licence with a limitation, and therefore hath not been of force, if the limitation which the Law makes in this case had not been, and the limitation in Law shall be preferred before the limitation in Deed, where they work to one and the same effect, and not different.

Arthur Johnsons Case.

5. **A** Rthur Johnson was possessed of a Term for years, and so possessed, assigned this over to Robert Waterhouse, and John Waterhouse, being Brothers to the Wife of the said Johnson, to the use of the said Wife; the said Johnson dies, and makes his Wife his Executrix, after which the said Wife takes Robert Witham to Husband, who takes the Profits of the Land during the life of his said Wife, the Wife dies Intestate, her said Brothers being next of kin to the said Wife, took administration as well of the Goods of the said Wife, as of her first Husband. And whether the said Waterhouses, or the said Witham shall have this Lease, or the use thereof, was the question in the Chancery, and thereupon put to the two chief Justices, upon which they and the chief Baron, and all the other Justices of Serjeants-Inn in Fleetstreet, and Beaumont also were clear in opinion, that the said Administrators had now as well the Interest as the Use also of the said Term, as well in Conscience as in Law, and that they had the use as Administrators to the said Wife, and that the said Witham shall not have it, because it is as a thing in Action, which the Administrators of the Wife alwaies shall have and not the Husband. As if an Obligation had been made to the use of the Wife: And this opinion was certified accordingly to the Lord Keeper of the great Seal of England, and it was so decreed.

Taunton versus Barrey.

6. **I**n an Ejectione firmæ brought by Giles Taunton Plaintiff, in the Kings Bench, against Giles Barrey Defendant, the Case was thus.
John Coles Esquire, made a Lease of the Lands in question to the Father of the said Barrey, for divers years, depending upon the life of the Lessee, and of the said Defendant, and of the Survivor of them, upon condition that the said Father should not alien without the consent of the said Coles & his heirs, after which the said Father devised the Term to the said Defendant and died, making his Executor, who assented; And the question upon this point found upon a speciall Verdict, was, whether upon the matter the Condition were broken; and by the opinion of the whole Court adjudged that it was, for in such a case he ought to have left it to his Executor, without making any Devise of it, for the Devise is an Alienation against him, and therefore it was agreed that the Plaintiff shall recover Term, 37 Eliz. Rot. between Roper and Roper.

Michaelmas Term, 38, & 39 Eliz.

Everets Case.
1. **T**his Case was moved by the chief Justice to the other chief Justices at Serjeants-Inne in Fleetstreet, concerning one Everet, who before was attainted for stealing of a Horse, & reprieved after Judgment, and Indited again for stealing another Horse before this Attainder: And the Vicar of Pelton, in the County of Somerset was Indited as accessory before this Felony, for the procurement of it: And Everet being again Indited upon this last Inditement, did not plead that he was formerly Indited of another Felony, &c. but acknowledged the Inditement whereby the Accessary was Arraigned, tried, and found guilty, and had his Judgment also as the principall, but the Execution of the Accessary was respited: And now moved whether upon this matter it shall be fit to execute the Accessary, the principall being executed.

And it seemed convenient to all the Justices and Barons that he shall be executed, and that the matter was clear in this case, because the principall did not take advantage of his first Attainder by way of Plea, but acknowledged the Deed, in which case the Accessary may well be Arraigned: But if the principall had pleaded his former Attainder, whether now he shall be put to answer for the benefit of the Queen, having regard to this Accessary, who otherwise shall go quit, because there was not any principall, but he who was formerly attainted.

And it seemed to Popham and some others, that it shall be in the same manner, as if the same person so formerly attainted should be tried now for Treason, made before his Attainder, as appeareth by 1 H. 6. 5. because it is for the advantage of the King in his Escheat of the Land: and notwithstanding, that it is moved by Stamford in his Pleas of the Crown, it seemed to Popham that there was no diversity where the Treason was made before the Felony of which he is attainted, and where after and before the Attainder: And by the same reason that he shall be again tried for the benefit of the King in this case because of the Escheat, by the same reason in this case here, because of the forfeiture which accrueeth to the Queen by the Attainder of the accessary, and for the Justice which is to be done to a third person, who otherwise by this means shall escape unpunished.

But he agreed, that the party Attaint shall not be again Arraigned for any other Felony done before the Attainder, in case where no Accessary was touched before the Statute of 8 Eliz. cap. 4. he who is convict of Felony, and hath his Clergy after his purgation made, shall be Arraigned for another Felony done before the conviction, if it be such for which he cannot have his Clergy, and was not convicted or acquitted of the same Felony before the Attainder: But upon this Statute it appeareth, that he who shall have his Clergy in such manner, shall not be drawn in question for any other Felony done before his Attainder, for which he might have his Clergy.

And of this opinion (as Clark and others of the Justices said) were all the Justices in the time of Wray. And as to the Statute of 18 Eliz. cap. 7. It is not to be understood but that he who hath his Clergy, and delibered according to this Statute, shall be yet arraigned for any other Felony done before his former Conviction or Attainder, if it be such for which he cannot have his Clergy: for the words are, That he shall be put now to answer, &c. in the same manner as if he had been delibered to the Ordinary, and had made his Purgation, any thing in this act to the contrary notwithstanding.

Pollard

Pollard *versus* Luttrell.

2. **I**n an Ejectione firmæ between Pollard and Luttrell for Lands in Hubury and Liffock, upon the Title between the Lord Audeley and Richard Audeley, it was agreed by the chief Justices, that if the Disseisor levy a Fine with Proclamations according to the Statute of 4 H. 7. and a Stranger with, in five years after the Proclamations enter in the right of the Disseeisee, without the pibity or consent of the Disseeisee, that this shall not avoid the Bar of the Fine, unless that he assent to it within the five years, for the words of the Statute are, so that they pursue their Title, Claim, or Interest by way of Action, or lawfull Entry within five years, &c. and that which is done by another without their assent, is not a pursuing by them according to the intent of the Statute, for otherwise by such means against the will of the Disseeisee, every Stranger may avoid such a Fine, which was not the intent of the Statute.

Mountague *versus* Jeoffreys and others.

3. **I**n Trespasse by Edward Mountague Plaintiff, against Richard Jeoffreys Land others Defendants, for a Trespasse done in certain Lands called Graveland, in Hailsham in the County of Sussex, the Case upon a special Verdict was this.

Sir John Jeoffreys late chief Baron, being seised in his Demesne as of Fee (amongst others) of the said Land called Graveland having Issue but one only Daughter, by his Will in writing devised all his Land of which he was seised in fee (except the said Graveland) to his said Daughter for 21 years, &c. and the said Land called Graveland (which was then in Lease for divers years, to one Nicholas Cobb, which years at the time of the death of the said Sir John Jeoffreys continued) he devised to the said Richard Jeoffreys his Brother, and his Heirs, and by the same Will he disposed divers Legacies of his Chattels, and the Remainder he gave to his said Daughter, and made her Executrix of his said Will; after which the first Wife of the said Sir John Jeoffreys being dead, he covenanted with Mr. George Goring to take the Daughter of the said George to Wife, and covenanted with the said George (amongst other Lands) to assure the said Land called Graveland to the said George Goring and Richard Jeoffreys, and their Heirs, to the use of the said Sir John Jeoffreys, and Mary Goring Daughter of the said George, and the Heirs of the said Sir John Jeoffreys, by a certain day, before which day the marriage being had, the said Sir John Jeoffreys made a Deed and sealed it, and delivered it, containing a Feoffment of the said Land called Graveland (amongst others) to the said George Goring and Richard Jeoffreys, and their Heirs, to the Uses aforesaid, in performance of the said Covenants, with a Warrant of Attorney to make Livery accordingly, and the Attorney made Livery in other parts of the Land, and not in Graveland, and this was in the name of all the Lands comprised in the Deed, and the said Nicholas Cobb never attorned to this Deed; After which Sir John Jeoffreys interlined in the said Will, that the said Mary then his Wife should be joynt Executrix with his Daughter: And in the Legacy of the rest of his Goods, &c. he interlin'd the said Mary his Wife to be Joynt-tenant with his said Daughter, without other publication thereof; and afterward the said Sir John died, the said Daughter being his Heir, who took to Husband the said Edward Mountague.

4. **I**n Trespasse, the Plaintiff suppoeth the Trespasse to be done in the breaking of his House and Close in such a Town, the Defendant justifies in a House and Close in the same Town, and sheweth which, to put the Plaintiff to his new Assignment, to which the Plaintiff replied that the House and Close of which he complains is such a House, and gives it a special name, upon which the Defendant demurs, and adjudged that the Plaintiff take nothing by his *Writ*: for albeit a House may have a Curtilage which passeth by the name of a Messuage with the Appurtenances, yet this shall not be in this case, for by the Bar the Plaintiff is bound to make a special demonstration in what Messuage and what Close he suppoeth the Trespasse to be done, as to say that the House hath a Curtilage, the which he broke, and it shall not be taken by intendment that the Messuages had such a Curtilage to it, if it be not specially named.

Fennors Case.

5. **I**n Trespasse brought by Fennor in the common Bench, against for breaking his Close in, &c. the Defendant pleads a Bar at large, to make the Plaintiff assign the place in certain, where he suppoeth the Trespasse to be done, the Plaintiff therupon alledgeth that the place where he complaineth is such, &c. and sheweth in certain, another then that in which the Defendant justifies, the Defendant avers that the one and the other are all one, and known by the one name and the other, and therupon the Plaintiff demurs, and adjudged there for the Plaintiff, because that in such a case upon such a special assignment, it shall be taken merely another then that in which the Defendant justifies, in as much as the Plaintiff in such a case cannot maintain it upon his evidence given, if the Defendant had pleaded not guilty to this new Assignment, that the Trespasse was done in the place in which the Defendant justifies, although it be known by the one and the other name, and that the Plaintiff hath good Title to it, because that by his special Assignment, saying, that it is another then that in which the Defendant justifies, he shall never after say, that it is the same in this Plea, for it is meer contrary to his special Assignment: And upon this a *Writ* of Error was brought in the Kings Bench, and the Judgment was there affirmed this Term for the same reason, Quod nota.

Scot versus Sir Anthony Mainy.

6. **I**n Debt upon an Obligation of 200 l. brought by John Scot Gent. against Sir Anthony Mainy Knight, the Condition wherof being to perform the Covenant comprised in an Indenture of Demise made by the said Sir Anthony to the said Plaintiff, of his Capitall Messuage in Holden with the Lands to it belonging, &c. amongst which Covenants one was, that whereas by the same Indenture he had demised it to him for 21. years, that the said Sir Anthony covenanted with the said John Scot, that the said Sir Anthony from time to time, during the life of the said Sir Anthony, upon the surrender of this Demise, or any other Demise hereafter to be made by the said Sir Anthony, of the said Messuages and Lands, and to be made by the said John Scot, his Executors or Administrators, and upon a new Lease to be made ready ingrossed to be sealed and offered by the said John Scot his Executors or Administrators, to the said Sir Anthony, for the like term and number of years in the aforesaid Indenture comprised for the same Rent, &c. to seal and deliver to the said John Scot, his Executors and Administrators. And the said Sir Anthony as to this Covenant pleaded, did not surrender, nor offer to surrender to him the said Demise, nor offer to him any new Demise of the Premises, ready engrossed for to seal it for the like Term, &c. as it is in this Covenant.

And for the other Covenants he pleads per formance of all; To which the Plaintiff replies, that the said Sir Anthony after the Obligation, and before the Action brought, had rendered the said Messuages and Lands by Fine to one Walter Savage and William Sheldon their Executors and Assigns for eighty years, from the Feast of Easter next before the Fine which was Pasch. 36 Eliz. wherby he said, that the said Sir Anthony had disabled himself to renew his Lease according to the Covenant, upon which it was demurred in the Common Bench, and the Judgment given for the Plaintiff, as appeareth, Trin. 37. Eliz. Rot. 2573. And upon this Judgment, a Writ of Error was brought in the Kings Bench and agreed this Term. And it was moved that the Judgment given was erroneous, in as much as the first act was to be done by John Scot before the new Lease was to be made, to wit, the surrender of the former Lease, and the drawing of the new one ought to have been done by the Plaintiff, which not being done on his part, the said Sir Anthony is not bound to make the new Lease.

And also it was moved, that as the case is here, the said John Scot might surrender to the Defendant, notwithstanding the intervening of this Lease between the Lease of the Plaintiff, and the Inheritance of the Defendant, as if a man make a Lease for years in possession, and afterwards make another Lease to a Stranger, to begin after the end of the former Lease, this shall not hinder but that the first Lease may be surrendered to him who was the Lessor, notwithstanding the said Term intervening.

To which it was answered by the Court, that the Plaintiff here need not to make any offer of the surrender of his Term to the said Sir Anthony, in as much as the said Sir Anthony hath disabled himself to take the Surrender, or to take the Lease according to the purport of the Condition, and by this disabling of himself the Obligation is forfeited, Come per 44 E. 3. 8. and by Littleton also, If a man make a Feoffment, upon condition to re-enseoff him, this is not to be done untill request therof be made by the Feoffor, yet if in the mean time the Feoffee suffer a failed recovery of the Land, grant a Rent charge, acknowledgeth a Statute, taketh a Wife, or the like, the Feoffor may re-enter, without request made to re-enseoff him, and the reason is, because that by any of these the Feoffee hath disabled himself to perform the Condition in the same plight, as he might have done at the time of the Feoffment, in the same manner here, for by this render by the Fine, the Reversion passe in right, so that the Termor in possession attorning to it, they shall have the Rent reserved upon the first Lease, and therefore the Plaintiff cannot now surrender to the said Sir Anthony, but to the Grantees of the Reversion, and therefore there shall be no prejudice to the Plaintiff, because the Defendant was the cause of disabling the Plaintiff to make the Surrender to him. And suppose it be but a Term to begin at a day to come, yet by this the Obligation is forfeited, because the Obligor hath thereby disabled himself to perform the Condition in such a plight as he might have done it when the Obligation was made, wherby the Obligation is presently forfeited, albeit the Plaintiff never surrender nor offer to do it: And therefore the Judgment there was affirmed.

Mounson *versus* West.

7. **I**f an Assise brought in the County of Lincoln, before Gawdy and Owen, by Thomas Mounson Esquire, Demandant, against Robert West, Tenant for Lands in Sturton Juxta Scu. The Defendant West pleaded Nul Tenant del Frank-tenant named in the Writ, and if that be not found, then Nul tort, nul Disseisin: And the Assise found that the said Defendant was Tenant of the Tenements now in Plaint, and put in view to the Recogni-

fores of the Assise, in manner and form as the Writ suppoeth: And further that the said West therof disseised the said Mounson, namely of the Tenements in the will of one Mounson: And did not find either the words of the Will, nor the Will it self what it was, &c. And the Justices of Assise upon this Verdict upon advice with the other Justices, gave Judgment, that the Plaintiff shall recover, &c. upon which a Writ of Error was brought in the Kings Bench, where it was moved that the Judgment was erroneous: First, because the Jury have not found that the Defendant was Tenant of the Freehold, agreeing with the form of the Plea, for the Writ of Assise doth not suppose him to be Tenant of the Freehold, and therefore the Verdict in this point not fully found.

The second Error is, that the Seisin of the Plaintiff is not required of, according to the charge given to them, as well as the Disseisen, for the charge was that they should enquire of the Seisen of the Plaintiff, &c. But to both these the Court answered that the Verdict is well enough, notwithstanding these exceptions, for every Assise brought suppoeth that there is a Disseisor, and a Tenant named in it, then this Assise being brought against a sole person, suppoeth him to be a Disseisor and Tenant also; and therefore the Verdict saying, that he was Tenant as the Writ suppoeth, is now as strong in this case, as if they had found that he was Tenant of the Freehold, for the Tenant of the Freehold ought to be named in the Writ: But if the Assise had been brought against two, or more, such a Verdict had not been good, for it sufficeth if any of them be Tenant of the Freehold, and then the Writ doth not suppose one to be Tenant more then another, but suppoeth one Tenant to be named in the Writ. And therefore in such a case the finding ought to be speciall, to wit, that such a one is Tenant of the Freehold, or that there is a Tenant of the Freehold named in the Writ. But where one only is named in the Writ to be Disseisor and Tenant, it is sufficient to find as here, for by this it is certainly found that he is Tenant of the Freehold.

And for the other point, although it be a good direction for the Judges to the Jury, whereby they may the better perceive that there ought to be a Seisin in him, or otherwise there cannot be a Disseisen by the other, yet in Deed he cannot be a Disseised who was not then seised: But the Assise having found the Disseisen the Seisen in Law, is found included in the Disseisen. But for the point moved, that the Verdict was not perfect, in as much as they found the Disseisen with a Nisi, it seemed to Gawdy that the Judgment upon this Verdict was erroneous, as where a Verdict in another Action is imperfect, a Venire facias de novo shall be awarded to try the Issue again: And if Judgment be given upon such a Verdict it is error; so here the Verdict in this point being uncertain, there ought to have been a Certificate of Assise to have this better opened: But the three other Justices held (as the case is) that the Verdict in this point is certain enough, for that which cometh before the Nisi (as it is placed) is meerly nugatoz. as in the case of the Lord Stafford against Sir Rowland Heyward, the Jury found Non assumpsit, but if such Witnesses say true (as they believe they did) Assumpsit, &c. it was but a meer negation.

But it seemed to Popham, that if the Verdict had been, if the words of the Will do not passe the Land, then that he disseised, and if they passe, then that he did not disseise; there if the words of the Will be not found, the Verdict had been all imperfect, but here the Verdict is full and perfect before the Nisi, &c. and therefore the Judgment was affirmed.

Holme *versus* Gee.

8. **A** Formedon in Descender was brought by Ralph Holme Demandant, against Henry Gee and Elizabeth his Wife Tenants, and the Case was thus.

Ralph Langley and others gave two Messuages and a Garden, with the Appurtenances in *Manchester*, to *Ralph Holme* the great Grandfather of the Demandant, and to the Heirs of his body begotten, after which the same great Grandfather by Deed indented, dated 20. September, 14 H. 7. enfeoffed *John Gee* of one of the said Messuages, and of the said Garden, rendring yearly to the said great Grandfather and his Heirs 13 s. 4 d. a year, at the Feasts of *S. Michael*, and the Annunciation, by equal portions, after which the said *John Gee* died seised of the said Messuages and Garden, and it descended to *Henry Gee* his Son and Heir; after which the said great Grandfather by his Indenture, bearing date 6. Martii, 12 H. 8. enfeoffed the said *Henry Gee* of the other Messuages, rendring also to him and his Heirs yearly 13 s. 4 d. at the said Feast aforesaid by equal portions, after which *Holme* the great Grandfather died, *Stephen Holme* being his Son and next Heir, who was seised of the Rents aforesaid, and afterwards also died seised, *Robert Holme* being his Son and Heir, after which the said *Henry Gee* died seised of the said two Messuages and Garden, and they descended to *Eliz.* his Daughter and Heir, who took to Husband one *Richard Shalcroft*, and had Issue the said *Elizabeth* wife of the said *Henry Gee*, Tenant in the *Formedon*, after which the said *Richard Shalcroft* and his wife died, after which and before the marriage had between the said *Henry Gee* and *Elizabeth* now Tenants in the *Formedon*, the said *Elizabeth* enfeoffed one *Richard Greensearch* of the said Messuages and Garden, after which, to wit, at the Feast of the Annunciation of our Lady, 3 Eliz. the said *Henry Gee* husband to the said *Elizabeth*, paid 13 s. 4 d. for the said Rent reserved as is aforesaid, to the said *Robert Holme*, after which, to wit, on Monday next, after the Assumption of our Lady at *Lancaster*, before the Justices there, a Fine was levied with Proclamations according to the Statute, between *Thomas Aynsworth*, and *Thomas Holden* then being seised of the Tenements aforesaid Complainants, and the said *Henry Gee* and *Eliz.* his wife, Deforcants of the Tenements aforesaid, wherby the Conusance was made to the said *Thomas*, and *Thomas* who rendred them to the said *Henry Gee* and *Eliz.* his wife, and to the Heirs of their bodies, the Remainder to the right Heirs of the said *Henry*: the five years past after the Proclamations in the life of the said *Robert Holme*, after which the said *Robert* died, and *Ralph* his Son and Heir brought the *Formedon* upon the Gift first mentioned, and the Tenants plead the said Fine with Proclamations in Bar, and the Demandant replied, shewing the severall discontinuances made by the great Grandfather as aforesaid, and the acceptance of the said Rent by the said *Robert*, by the hands of the now Tenant *Henry Gee* as is before alledged, and that the said *Henry* was then seised of the said Tenements in Fee in right of the said *Eliz.* then his wife, and although that he alledge the said severall Feoffments to be made by Deeds indented, with the reservation as aforesaid, yet it is not mentioned in the Replication that he shewsforth the Deeds wherby the reservation was made; To which the Tenant by way of Rejoinder shew the Feoffment made by the said *Eliz. Shalcroft* to the said *William Greenbitch*, wherby he was seised at the time of the payment of the said Rent at the said Feast of the Annunciation of our Lady, and traverse Absque hoc, that the said *Henry Gee* was therof then seised in right of his wife, in manner and form, wherupon it was demurred in Law, and adjudged by the Justices of Assise at *Lancaster*, that the Plaintiff should be barred, wherupon the Tenants have now brought their Writ of Error.

And

And by Popham and Clench the Judgment is to be affirmed; First, because that the acceptance of the said Kent had been by the hands of one who was to pay it, to wit, the Tenant himself, yet this shall not bar the right of Intail in the said Robert Holme (as a release of his right should do) but this acceptance shall only foreclose him of his Action, to demand the Land during his life, and therfore the right which the said Robert had, being barred by the Fine, the Son is without remedy, for the Son shall never have remedy upon the Fine levied in time of his Father, the five years after the Proclamations being passed: But in case where the right begin first to be a right in the Son, and not where there was right in the Father.

And further, it seemed to them, that the payment of him who had not anything in the Land at the time of the payment, as here, shall make no conclusion to him who accept it, because this payment is as none in Law.

And by them the Responder of the Traverse, Absque hoc, that Henry Gee was seised at the time of the payment in Fee, in right of his said Wife, in manner and form, as in the Replication is alledged, is good enough, for he traverseth that which the Demandant hath specially alledged to destroy the Bar, and contrary to that which is alledged, it shall not be intended that they had other particular Estate at the time of the payment, which may make the payment to be good.

And albeit the Traverse had been, Absque hoc, that the said Henry was seised in right of his said Wife, Modo & forma prout, the Demandant hath alledged without saying in Fee, as it is pleaded here, yet the Jury shall be put to find it, if he were seised in Fee, In jure Uxoris, and not of any other particular Estate, as in 12 E. 4. 4. A Feoffment is pleaded by Deed, the other makes Title, and traverseth Absque hoc, that he enfeoffed Modo & forma, not shewing forth the Deed, yet he who pleads the Feoffment, by Littleton, shall give no other Feoffment in evidence, then that which is pleaded by the Deed. And by 18 E. 4. 3. In Trespasse the Defendant justifies the entry and sowing of Corn, because that M. was seised in Fee, and sowed the Land, and the Defendant as his Servant entred and cut it, the Plaintiff saith, that it was his Freehold at the time of the sowing, Absque hoc, that it was the Freehold of the said M. and per Curiam, it is not good, for such matter was not alledged by the Defendant, but he ought to traverse the Seisin in Fee, which was alledged, and good, and so it is good here.

But it seems to Clench, that the Replication is not good, because he doth not say, by the Writing upon which the Reservation was made, which concludes Robert by his acceptance, Hic in Curia prolat. as by Hill. 15. E. 4. 15. If a man will bar a woman of her Action for her Land after the death of her Husband, by Feoffment made by the Baron and Feme, during the Coverture by Deed, rendering Kent, by reason of acceptance of the said Kent after the death of the husband, he ought to shew the Deed, and say, Hic in Curia prolat. or otherwise the Plea is not good, because that in such a case albeit it were a Gift in Tail, the wife shall not be concluded by her acceptance, unless that the Gift were by Deed.

Popham, True it is, in case the party will demur upon it: but suppose in this case, the Tenants had expressly acknowledged the said Feoffments, and then concluded afterwards as they have done here, shall they afterwards take advantage of not shewing the Deed? I think that not, no more here where they admit it, and plead the other matter to avoid the conclusion; for if a double Plea be pleaded, if the other party demur upon it, he shall take the advantage of the doubleness: But if he passe it over, and they proceed in pleading upon another point, the doubleness is gone.

And Fennor said, that the right which is intended to be saved within the first branch of the Statute of 4 H. 7. is, that upon which the party may pursue his Action, or enter for his remedy, the which the said Robert could not do in, when the Fine was levied, because he had accepted the Rent, but the first right which was in such a case, was that in the Demandant.

Stroud *versus* Willis.

9. **I**n Debt upon an Obligation of 40 l. by William Stroud Plaintiff, against John Willis Defendant, the Condition whereof was, If the said Willis his Heirs, Executors, or Assigns, should pay or cause to be paid yearly to the said William Stroud, the Rent, or sum of 37 l. 10 s. of lawfull money, at the feasts of S. Michael, and the Annuntiation, by equall portions, according to the Tenor, true intent, and meaning of certain Articles of agreement indented, made between the said parties of the same date, that the Obligation was, that then the Obligation shall be void, and the Defendant shewes the Articles which were thus, to wit, that the said William Stroud had demised to the Defendants all such Tenements in Yeatminster, of, or in which the said William then had an Estate for life by Cope. Anglice Copie des, except according to the custom of the Manor of Yeatminster, from the Annuntiation of our Lady then last past, for forty years, if the said William should so long live, rendering yearly to the said William 37 l. 10 s. of lawfull money, at the feasts of S. Michael, and our Lady, by equal portions, under the East-gate of the Castle of Taunton, in the County of Somerset, &c. with divers things comprised in the said Articles. To which points the Defendant pleaded, that at the time of the making of the said Articles the Plaintiff had not any Estate in the Tenements in Yeatminster aforesaid, for term of his life, by Cope, Anglice Copie des, except according to any custom of the said Manor of Yeatminster, and that the Obligation was made for the payment of the same Rent reserved by the said Articles, and demands Judgment, &c. whereupon the Plaintiff demurred in the Common Bench, and there Judgment was given that the Plaintiff should recover his Debt and Damages, as appeareth there, Mich. 36, & 37. Eliz. Rot. 312. upon which a writ of Error was brought in the Kings Bench, and there moved that the Judgment was erroneous, in as much as upon the matter he ought to have been barred of his Action: for if an Action of Debt had been brought upon the Demise, by the Articles, the Defendant might have pleaded as here, and the Plaintiff should be clearly barred: As if a man be bound to make an Estate, or to assure to another all the Lands which he hath by descent from his Father, or all the Lands which he hath by purchase from such a one, or the like.

And of this opinion Gawdy was, saying, in as much as the Obligation is, that he shall be paid according to the true intent of the Articles, the intent of them is not that the Rent shall be paid if any Land be not passed by them, for it should be paid, as by 22 H. 6. if a man be bound to pay a Rent which is reserved upon a Lease made to him, he ought to pay it at his peril: But if it be to pay it accordingly to the Lease, there he said, it is not payable but upon the Bond, and is to be paid as a Rent. And if the Land be evicted in the interim before the day of payment, the Obligor shall help himself by pleading of it upon such an Obligation to discharge the Bond, so here: But it seemed to Popham, that the Judgment was well given, and yet he agreed the Cases that were put; but he said there was a diversity where the Obligation goes in the generality, and where it tends to a speciality: for as by 2 E. 4. If a man be bound to be Non-suit in all Actions which he hath against such

such a one, or to assure to another all his Lands in Dale, he may say, that he hath not any Suit, or that he hath no Land in Dale: But if it be that he shall be *pon-suit* in a Formedon depending, or to enfeof him of White acre, there it is no plea, because he refers to a special point. And by 18 E. 4. If a man be bound to another to pay him 10 l. for which a stranger is bound to the said Obligee, it is no plea for him to say, that the stranger is not bound to pay him 10 l. for when the Condition refers to such a speciall matter, this cannot be denied of him who is bound.

And therfore in this case the Defendant cannot say, that there were not any such Articles, contrary to that which is specially comprised in the Condition, as by 28 H. 6. A man was bound to perform the Covenants comprised in a certain Indenture of Covenants, he shall not say, that there was not any such Indenture, because it resorts to a speciall.

So I think, if a man be bound to pay the Rent of 10 l. a year reserved upon an Indenture of Demise made of Lands in D. payable at such a Feast, he shall not say against it, that there was no such Demise made, nor no such Rent reserved upon the Demise, but is estopped of the one and the other. And in Hill. 3. Eliz. A man was bound that he shall pay to A. or the Obligee, all such summs of money as T. S. deceased stands bound to pay by his Obligation to the said A. and of one R. P. to the behoof of the Children of such a one, according to the Will of the said party; and in Debt upon this Obligation he saith, that the said T. S. was never bound by any such Writing Obligatory to the said A. and R. P. &c. to pay, &c. *Pro usu filiorum*, &c. as in the Condition; and per Curiam adjudged no good Bar, because he is estopped to deny the speciall matter, which is matter of Writing, and not a bare matter in Deed.

Kirton *versus* Hoxton, and others.

10. **I**f an Appeal of Mayhem brought by Kirton Plaintiff, against Rob. Hoxton Esq; and divers other Defen. the one of the Defen. plead *Nul tiel in rerum natura*, as another of the Appellees, and if it be not found then as to the Felony and Mayhem not guilty: Agreed by the whole Court that such a manner of pleading is not to be suffered in an Appeal of Mayhem, because no life is put in danger by the suit: And yet it was objected that there are presidents, that such form of pleading hath been admitted in Appeals of Mayhem. But the Court had respect to it, that the reason in all the Books of Law in which it hath been admitted in an Appeal of death, and the like, is, that it stands in *Favorem vite*, and therfore it is admitted to be good, or otherwise by the Books, it shall not be admitted to be so, for the doubleness of it: But no life is to be put in jeopardy in this case, and therfore such a plea shall not be admitted, but the *spot guilty* shall stand, by which the other plea is waived.

Appeal of
Mayhem.

Hillary Term, 38 Eliz.

Henry Earl of Pembroke, *versus* Sir Henry Brackley.See this Case
Coke lib. 5. 76.
a.

In an Action upon the Case, between Henry Earl of Pembroke Plaintiff, and Sir Henry Brackley Knight, Defendant, the case upon the pleading appeareth to be thus.

The said Earl was seised in his Demesne as of Fee, of the Mannor of Stocktrist, in the County of Somerset, to which Mannor the Office of the custody of the Forest of Selwood, in the same County belongeth, and also that there was before time of memory, an Office within the same Forest called the Lieutenancy, or Custody of the said Forest belonging to the said Mannor, of which also the said Earl was seised in his Demesne as of Fee: And that there was one part of the said Forest called the West part of the said Forest, in which there were two Walks, or Bayliwicks, the one called Staverdale walk, and the other Bzewick walk: And that the said Lieutenancy had the charge of the Deer, and the disposition and appointment of the Keepers of the said Forest. And that the said Earl being so seised, by his Writing, bearing date 5. Novemb. 12. Eliz. reciting that his Father had granted the Office of Lieutenancy, and Deputyship, of the said West part of the said Forest, *Cum huius, &c. quando acciderit*, and the Keeper-ship of Bzewick walk aforesaid, to the said Sir Maurice Barkley Knight, and the Heirs Males of his body, and instituted and ordained him, and the Heirs Males of his body, Lieutenancy and Deputy thereof to the said Earl and his Heirs, confirmed the Grant aforesaid,

And further by the same Deed granted and confirmed to the said Sir Maurice, and to the Heirs Males of his body, the said Lieutenancy and Deputyship of the said West part of the said Forest, and also the Keeper-ship of the said Walk called Staverdale Walk, together with the Lodges, &c.

Provided alwaies, and the said Sir Maurice covenanted and granted, for him and the Heirs Males of his body, with the said now Earl his Heirs and Assigns, that it shall be lawfull for the said Earl his Heirs and Assigns, to have all the Preheminence or commandment of the said Game and Hunting, and pleasure there, as if this Grant had not been made.

Provided also, and the said Sir Maurice covenanted, granted, and promised for him, and the Heirs Males of his body, to, and with the said Earl, his Heirs and Assigns, that the said Sir Maurice and the Heirs Males of his body, and their Assignee, and Assignees, will preserve the Game as fair as it commonly hath been used, and that neither the said Maurice, nor any of the Heirs Males of his body, nor any of their Assignees, will cut any manner of Wood growing upon any part of the Premises, unlesse for necessary Brouse, and such as they may lawfully cut of their own, and as was accustomed, &c. after which Sir Maurice died, and Sir Henry Barkley his Son and Heir Male, cut four Okes within the said Walk called Bzewick, growing upon the soile of the Queen there, every one of them being Timber, and of the value of 13 s. 4 d. and converted them to his own use. And whether by this act done by the said Sir Henry the now Earl of Pembroke, may re-enter into the things granted by him, was the question, which stands upon two points, the first, Whether the last Proviso makes a Condition, or be but a meer Covenant. 2. Whether this Act makes a Forfeiture of the said Offices granted as before by the course of the Common Law.

Gaudey, Clench, Walmsley, and Beaumont, that the first Proviso is not a Condition

Condition, either because he is not by this to do more then he may do by his superiour custody, in which case he ought to do it by his own authority, as to take his fee Deer, or to chase and kill Deer by Warrant, and the like; or otherwise if it shall be taken, that he may by this Proviso kill or chase the Game at his pleasure, it is void, because as to it, he is to do that which he ought not to do by his Office, to wit, to destroy the Game, which by his Office he is to preserve; and therefore for the first, it stands merely upon the Covenant.

Then when he saith further in the second clause; Provided also, and the said Sir Henry Barkley covenants, this is to be intended that it shall be as the other for the word also, and this is but a bare Covenant as the first was.

And they said further, that this last Proviso shall be said entirely the words of the Grantee himself, as the Covenant is, and without words of the Grantor a Condition cannot be, for it is for him to condition with the Estate given, and not for him to whom the Grant is made; And therefore suppose that it had been on the other part, to wit, Provided alwaies, and the Grantor covenant that the Grantee shall have the refuse of the brouse, and the like; this shall not be said to be any Condition, but a meer Covenant: In like manner shall it be on the other part.

And further it is common for Scriveners, and ignorant persons to make in effect every Covenant to begin with a Proviso in this manner, and therefore to expound such a manner of Proviso as a Condition, it shall be too perilous to the Estates of men.

And for the case upon the Lease made by Serjeant Bendloes, which was thus.

Provided alwaies, and it was covenanted, granted and agreed between the parties, if the Lessee sell, or alien the term that the Lessor shall have the preferment, This they agreed to be a good Condition, as was adjudged in the Common Bench, 32 Eliz. but the case there is, because they are the words as well of the Lessor, who may add a Condition to the Estate, as of the Lessee who made the Covenant, which is not here. But they said, that the case between Hamington and Pepull which was 17 Eliz. in the Kings Bench, was more nigh in resemblance to the case in question, which was that the said Pepull made a Lease for years to Hamington of a Farm, except the wood, and covenanted with the Lessee that he shall take all manner of underwood; provided alwaies, and the Lessee covenant that he will not cut any manner of Timber-tree, & this was adjudged no Condition. And as to the other point they said, that the cutting of Trees by him who had the custody of the Forest, is not a forfeiture of his Office by the Common Law, as it is of him who hath the custody of a Park, for there is another speciall Officer who hath the charge of wood in a Forest, to wit, the Verderer and the Woodward, and therefore it is no forfeiture of him who hath the custody of the Forest to cut Trees, for he hath another charge, to wit, the custody of the Game only, and not of the Wood.

And further the cutting of one or two Trees is no cause of forfeiture, for it may be that there is covert shade and brouse sufficient of that which yet remains, in which case it is no forfeiture if it be not averred that these things are impaired by it.

But the chief Justices, chief Baron and all the other Justices and Barons were of a contrary opinion. And for the matter of forfeiture at Common Law, they said that it was a cause of forfeiture of an Office at common Law to cut the Trees, as well in the case of a Forester, as in case of a Park-keeper, for the Forester hath not only the charge of the Game, but of all that is within the Forest by which the Game is fed, preserved, or succoured,

and they are fed by the house, and succoured by the shade, and have the calmer and better lodging by reason of the Trees; and therefore by their Office they are to have a care of these things as well as of the Game, for without these the Game cannot stand: as to say, that there are others who have special charge of the Wood and Pasture, as the Woodward, or Agister, &c. this is no proof that the Foresters, or Keepers are discharged thereby.

And the Foresters and Keepers are by their Offices to present the Wilders in the Woods within the Forests of the Woodwards, and therefore they have to do with it. And by Carta de foresta, none may cut his wood within his Forest, Nisi per visum Forestarii, ergo the Foresters have charge thereof: And every voluntary act done by an Officer contrary to that which belongs to his Office is a forfeiture of his Office, as by voluntary killing of Bucks, cutting of Trees, Wood, or the like: but otherwise it is of things done or suffered by his negligence if it be not common or often. And albeit the Trees here were not many, or that it was not averred that the Game was to be hurt thereby, yet it cannot be intended but that it is so much impaired by it, as it should be by the killing of a Buck in the Forest, by which the Office shall be forfeited, because the Game is thereby the worse, and yet there may be Game sufficient without this Buck, but he hath voluntarily done a thing contrary to his Office, and therefore it is a forfeiture of his Office, and so it shall be in this case.

And for the other point they said, it was a Condition and also a Covenant, and it was for good purpose to have it to be so: For suppose that the Game had been destroyed by the said Sir Henry, shall this be a sufficient recompence or satisfaction to enter for the Condition broken? No, and therefore the Covenant was made to recompence him for Damages.

When a Proviso makes a Condition.

And when upon the Habendum a Proviso is added for a thing to be done by him to whom the Deed is made, or to restrain him to do any thing, this is a Condition, as well as if it had been a Condition which shall make or shall restrain to do such a thing, for they are in this case the words of the Grantor, to restrain the Grant in some manner, and to shew in what manner he shall have it, and it is always to him who passeth the Estate, and to no other. Then suppose here, that the Proviso had been; Provided alwaies that the Grantee shall not cut any Tree, And the Grantee covenant also that he will not cut any Tree, this is plainly a Condition and also a Covenant; then it is as plain in the case in question, which is; Provided also, and the Grantee covenant, &c. that he will not cut any manner of Wood: distinguish the sentence by his proper distinction, and it is cleer that it is a Condition as well as a Covenant. And to say, that there is a diversity between this case and the case upon Serjeant Bendloes Lease, because there it is, Provided alwaies, and it is covenanted and agreed between the parties; In which case it is alledged, that the agreement which is the Plaintiffs, goes to the Proviso to make it a Condition for him, as well as it shall go to the Grantee to make it to be a Covenant from him: they understand no difference, because the Proviso as it is placed, is of it self as spoken by the Plaintiff; and the agreement between the parties that such a thing shall be done by the Lessee, makes it a Covenant on his part only, all being to be performed by him, as plainly as in the case in question.

And to say, that the last Proviso shall not be a Condition, because the first cannot enure as a Condition, because that which is to be done may lawfully be done with it, or without it, or because that the matter to which the Proviso is annexed, is repugnant to the nature of the thing granted, yet this is not because of the nature of the word it self, but by reason of that to which the Proviso is annexed, and therefore the Proviso following hindered in its operation by

by meanes of the word, also: And therefore if a man makes a Lease for yeers, provided alwayes that the lessee may enjoy and hold the Mannors of D. (which is other Land) or that the Lessee shall kill I.S. these are void of Conditions; But grant then that it is further provided also that he shall not alien his Terme, is not this a good Condition although that which was Precedent was no Condition? It is clear that is not; And they said for Hamingtons Case that it was but of the nature of a declaration with what wood the Lessee shall meddle, because it depends upon the Covenant of the Lessor, and it is generall, to wit, that he may cut any manner of underwood, provided that he do not cut any manner of Timber; and Popham was of counsell with Hamington in this case, and the Court at the beginning insisted much that it was a Condition, and that for the reason then alleged, that it depended upon the Covenant of the Lessor, which was general for all manner of underwood, because that Standels growing between great Trees, might be taken within the generall words of all manner of underwood, for to make it plain it was well put in, that he shall not cut any manner of Timber Trees, and therefore in this point it was but a Declaration, with what wood he should meddle, although in truth it was of another thing then was comprised in the Covenant before: And then the adding of a Covenant to such a Proviso shall not make the Proviso of another nature, then it was before the Covenant made, or if no Covenant had been added to it, and upon this reason the Court then gave Judgment for Hamington. And by him, if I am seised of the Mannor of D. in D. and of Black acre in D. and so seised, I covenant with I.S. that he shall enjoy the said Mannor for ten years: Provided and the said I.C. covenant that he shall not enjoy Black acre, this Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration, that it is not my intent that Black acre shall passe, be it parcel or not parcel of the said Mannor; Then the Covenant following will not alter the nature of the exposition of the Proviso which the Law shall make of it self, if it had stood of it self without a Covenant following.

And for the Proviso here, he put this case, suppose it had been; Provided, and the Grantee covenants that he shall not cut any Trees: None will deny but that this had been a Condition and a Covenant also: And what diversity is there where the word is at the conclusion, and so couple the Condition and Covenant together. And we are not to alter the Law for the ignorance of Scriveners, who do they know not what by their ignorance, shall be corrected by the Law.

And they agreed, that where a principall Officer is by his Office to make inferior Officers under him, and the inferior Officer commits a forfeiture, the superior Officer shall take advantage thereof, and shall place a new Officer, as was done in 39 H. 6. for the Office of the Marshall of the Kings Bench, put in by the great Marshall of England.

Easter Term, 39. Eliz.

Overton *versus* Sydall.

5 lo. 16. a
3 Mod. 325
4 Mod. 71
1 Show. 340
Carth. 177

1. **I**n Debt between Valentine Overton Clark, Prebendary of the Prebend of Tervin in the County of Chester, founded in the Cathedral Church of Litchfield in the County of Stafford, against Thomas Sydall Executor of William Sydall, the case appeared to be this.

Henry Sydall Clark, Prebendary of the Prebend, 26 Maij 5. E. 6. with the assent of the Dean and Chapter, and by Writing indented, demised the said Prebend. to the said William Sydall for 43. years from the Feast of the Annunciation of our Lady, in the year of our Lord 555. at the yearly rent of 36 l. William Sydall assigned over his term, and died, making the said Thomas his Executor, Henry Sydall also died, and afterwards the Plaintiff was made Prebend, and for the rent arrear in his time, and after the assignment this Action is brought against the Executors in the *Debet and Detinet*.

3 lo 23. b
1 Brownl. 56

And it was alledged that in Hillary Term 36 Eliz. Rot. 420. in the case between Glover and Humble, it was adjudged in the Kings Bench, that the Grantee of the Reversion shall not maintain an Action of Debt upon a Lease for years against the Lessee himself, for any arrears of Rent incurred, after that he had made an assignment of his Term over to another, and alledged also that in Hillary, 29 Eliz. in a case between *it was adjudged*, that an Action of Debt lyeth for the Lessor himself against the Lessee, for arrearages of Rent reserved upon the Lease, and accrued after the Lessee had assigned his Term over; and both these cases were adjudged accordingly in the Kings Bench, and the reason in the first case was, because that by the Grant of the Reversion over, the privacy of contract which was between the Lessor and the Lessee is dissolved, and the Grantee of the Reversion as to it but a stranger.

Walker & Harris. 3. Co. 24

But in the last case the privacy of contract is not dissolved between the Lessor and the Lessee, notwithstanding the Lessee hath passed over his Term, neither is the contract thereby determined between the parties.

But Fennor said, that in this case the privacy in Deed is gone by the death of the Lessee, and therefore the Executor who is but privy in Law, is not subject to this Action, unless in case where he hath the Term; in which case he shall be charged as he who hath *Quid pro quo*, which is not in the case here.

And he said further, that a Lease made by a Prebend is good no longer than his own life, but is meerly void by his death, and therefore shall not be said to be a contract to bind further than his life, and therefore also he said, that the Action will not lye in the said case for the Successor.

But Gawdy said, that here the Lease is confirmed, and therefore good during the Term, but it seemed to him that the Executor who is but in privy in Law shall not be chargable with this action, for the arrearages due after the assignment over, and yet he agreed that the Heir, the Successor, and the Executor of the Lessor shall have debt against the Lessee himself, for the arrearages which accrues to be due after the assignment over of the Lease:

But

But he said, that the Action of Debt against the Executoz upon a Lease made to the Testatoz, and for the arrearages due in the time of the Executoz, ought to be in the Debet and Detinet, and that for the occupation of the Term, whereby he hath Quid pro quo, which is not in this case.

Popham said, that for the time that the contract shall bind in nature of a Contract, there is not any difference between the Heir the Successor, and the Executoz of the Lessor, and the Executoz or Administrator of the Lessee, for the one and the other are equally privy to the Contract, and a Contract or Covenant especially being by writing, binds as strongly the Executoz or Administrator, as the Testatoz or the Intestate himself who made it, for these are privies indeed to the Contract, and as to it represent the person of the Testatoz or Intestate himself.

And he agreed, that the Action of Debt against the Executoz, for the arrearages of Rent of a Lease which he occupies as Executoz, and accrued in their own time, shall be in the Debet and Detinet: The reason is, although they have the Land as Executoz, yet nothing thereof shall be imployed to the Execution of the Will, but such Profits as are above that which was to make the Rent, and therefore so much of the Profits as is to make, or answer the Rent, they shall take to their own use to answer the Rent, and therefore they having Quid pro quo, to wit, so much of the Profits for the Rent, the action ought to be brought against them in such cases, where they are to be charged in Debt for Rent upon a Lease made to the Testatoz, and have not the Profits of the Lease it self, nor means, nor default in them to come to it, the action of Debt ought to be against them in the Detinet only, and this is the case here, and therefore the action being in the Debet and Detinet doth not lye.

And further he agreed in this case to the opinion of Fennor, that the action here doth not lye for the Successor of the Prebend who made the Lease, for no more then the Successor in this case shall be bound by the Contract of his Predecessor, no more shall he take advantage by this Contract, for it is the consideration which makes him to be bound, and not only the Contract, and so the Successor in such cases is but privy in Law, and not in Deed to the Contract of his Predecessor. But otherwise it is of the Successor of a Bishop and the like, which Leases are not void against the Successor, but voidable.

Case of Armes.

2. **V**pon an assembly of all the Justices and Barons at Sergeants-Inne, this Term, on Monday the 15. day of April, upon this question moved by Anderson chief Justice of the Common Bench: Whether men may arme themselves to suppress Riots, Rebellions, or to resist Enemies, and to endeavour themselves to suppress or resist such Disturbers of the Peace, or quiet of the Realm; and upon good deliberation, it was resolved by them all, that every Justice of Peace, Sheriff, and other Minister, or other Subject of the King, where such accident happen may do it: And to fortifie this their resolution, they perused the Statute of 2 E. 3. cap. 3. which enacts that none be so hardy as to come with force, or bring force to any place in affray of the Peace, nor to go or ride armed, night nor day, unlesse he be
A i a Servant

Servant to the King in his presence, and the Ministers of the King in the execution of his Precepts, or of their Office, and these who are in their company assisting them, or upon cry made for Weapons to keep the Peace, and this in such places where accidents happen upon the penalty in the same Statute contained; whereby it appeareth, that upon cry made for Weapons to keep the Peace, every man where such accidents happen for breaking the Peace, may by the Law arme himself against such evill Doers to keep the Peace.

But they take it to be the more discreet way for every one in such a case to attend and be assistant to the Justices, Sheriffs, or other Ministers of the King in the doing of it.

Rebellion of
Subjects high
Treason.

3. **A**t the same time it was also resolved by them all (except Walsley, Fennor, and Owen) in the Case of one Richard Bradshaw and Robert Burton, who with others lately by word entred themselves into an agreement one with another to rise and put themselves into Armes, and so to go from one Gentlemans house to another, and so from house to house to pull down Inclosures generally; that this so appearing by their own confession, or by two Witnesses according to the Statute, is high Treason by the Statute of 13 Eliz. cap. 1. The words of which Statute are, That if any intend to levy War against the Queen, and this maliciously, advisedly, and expressly declare or utter by any words or sayings, that this shall be high Treason: For all agreed that Rebellion of Subjects against the Queen hath been alwaies high Treason at the Common Law, for the Statute of 25 E. 3. cap. 1. is, that levying of War within the Realm against the King is Treason, and Rebellion is all the War which a Subject can make against the King.

But Walsley and the others with him said, that the Statute of 1 Mar. cap. 12. 10. That if any to the number of twelve, or more, assemble themselves to the intent to pull down Inclosures, Pales, and the like with force, and continuing together after proclamation, according to the Statute, to go away by the space of an hour, or do any of the Offences mentioned in the Statute, that this is Felony: So that if these Actions had been Treason at the Common Law, it had been to no purpose to have made it Felony.

And it seemed to them that the resistance ought to be with force to the Queen, before that such Acts shall be said Treason.

But all the other Justices agreed (and so it was put in ure lately in the case of the Rentices of London) that if any assemble themselves with force to alter the Laws, or to set a price upon Vidualls, or to lay violent hands upon the Magistrate, as upon the Mayor of London, and the like, and with force attempt to put it in action, that this is Rebellion and Treason at Common Law, and yet this Statute of 1 Maria, makes it in such a case but Felony.

And they put a diversity between the cases of pulling down Inclosures, Pales, &c. comprised in the Statute of 1 Mar. for those are to be understood where diverse to the number of twelve, or more, pretending, any or all of them to be injured in particular, as by reason of their common, or other Interest in the Land inclosed, and the like, and assembling to pull it down forcibly, and not to the cases where they have a generall dislike to all manner of Inclosures, and therefore the assembling in a forcible manner, and with Armes to pull them down where they have any Interest, whereby they were in any particular

particular to be annoyed or grieved, is not Treason; but the case here tending to a generality, makes the act if it had been executed to be high Treason by the course of the Common Law.

And therefore the intention appearing as the case is here, it is Treason by the Statute of 13. aforesaid.

Periam in some manner doubted of the principall case, but to intend to rise with force to alter the Laws, to set price upon any Victuals, or to use force against a Magistrate for executing his Office of Justice, and the like, he said that they were clearly Treason by the Statute of 13. aforesaid, if it may appear by expresse words, or otherwise, as the said Statute mentions, for all these tend against the Queen, her Crown and Dignity, and therefore shall be as against the Queen her self: And if it had been put in practice it had been Treason at the Common Law.

Here ends the LORD P O P H A M'S
REPORTS.



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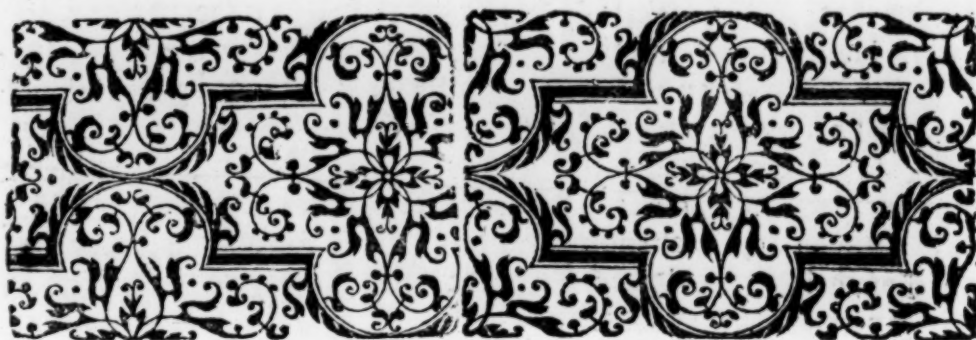


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An addition of certain Select CASES in
the time of KING JAMES, and KING
CHARLES.

Trin. 15. Jac. In the Kings Bench, entred, Hill. Jac. Rot.
194.

Brooks Case.

In an Ejectione firmæ brought by one Brook against Brook, the
Case was thus.

John Wright a Copyholder in Fee, 10 Eliz. surrendered his Land
into the hands of the Lord by the hands of Tenants, according to
the Custom, &c. without saying, to whose use the Surrender should
be; And at the next Court the said John Wright was admitted Habendum to
him and his Wife in Tail, the remainder to the right Heirs of John Wright,
and the Wife of John Wright now Defendant was seised from the time of
the admittance untill this day: And it was objected by the Counsell of the
Plaintiff, that the surrender was void, because no use was limited, and ther-
fore by constitution of Law ought to be to the use of the Surrender, as if a
Feoffment be made and no Use limited, it shall be to the Use of the Feoffor,
or as it is in Sir Edward Cleers Case Coke lib. 6. 18. If a Feoffment be
made by one to the use of his last Will, he hath the use in the mean time.

Where upon
surrender of
Copyhold
land no use is
limited, to
whose use it
shall be.

2. That the admittance was not available to passe an Estate to the Wife,
for she was not named in the Premisses but only in the Habendum, and the
Office of an Habendum is to limit the Estate and not the person, and therefore
it is said in Whogmorton and Tracies Case in Plowd. com. That if one be
named to take an Estate in the Habendum, where he was not named at all in
the Premisses, this is not good.

But it was resolved by the whole Court for the first point, that the subse-
quent Act shall explain the Surrender, for, Quando abest Provisio partis, ad-
est provisio legis: And when the Copyholder accepts a new admittance, the
Law intends that the Surrender generally made was to such an Use, as is
specified in the admittance, and the Lord is only as an Instrument to con-
vey the Estate, and as it were put in trust to make such an admittance, as he
who surrenders would have him to make: And Crook Justice said, Fides
adhibita fidem obligat.

For the second point it was also agreed by the Court that the Wife shall take by this admittance, albeit she were not named in the Premises, but only in the Habendum; and they agreed, that in Feoffments and Grants, the party that is not named in the Premises shall not take by the Habendum; and therefore Throgmorton and Tracies Case (as to this point) is good Law; But this case of a Copyhold is like to the case of a Will, or to the case of Frank-marriage, in which it is sufficient to passe an Estate, albeit the party be only named in the Habendum, and if it should be otherwise the Estates of many Copyholders would be subverted: And so they resolved that Judg- should be given for the Defendant.

The same Term in the same Court.

Laurking and Wildes Case.

Tithes for a
riding Nag.

The Rector of the Church of libelled in the spirituall Court, for the Tithes of a riding Nag, where the case was; That a man let his Land, reserving the running of a Horse at some time, when he had occasion to use him there: The Defendant shewed this matter in the Court by his Counsell, and prayed a Prohibition, and avers, that for the same Land in which the Horse went he paid Tithes. And by the Court, nigh London, a man will take a 100. or 200. Horses to Grasse, now he shall pay Tithes for them, or otherwise the parson shall be defeated. But in this case, if the Defendant alledge and prove that it was a Nag for labour, and not for profit, a Prohibition lies.

The same Term in the same Court.

Haver gall versus Hare.

Afterwards
fol 55.

In an Ejectione firmæ brought by Haver gall against Hare, the Case was thus. A Rent of 20 l. per annum was granted out of Green acre to one and his Heirs, to be paid at Michaelmas, and the Annunciation of our Lady, by equall portions, and the Grantor covenants, that if the Rent of 20 l. be arrear by the space of twenty daies, that the Grantee may distrain, and that if there be not sufficient distresse upon the Land, or if there be a Rescous Replevin, or Pound-breach, that then it shall be lawfull for the Grantee and his Heirs to enter and retain the Land to them and their Heirs, untill the 20 l. be paid, 10 l. for one half years Rent was in arrear, and for it an entry was made.

Mountague chief Justice, and Doderidge Justice, there can be no entry made when 10 l. only is behind, for the words of the Deed are, that if the Rent of 20 l. be behind, that the Grantee and his Heirs may enter, and if he shall enter now he shall retain the Land for ever, for the 20 l. shall never be paid.

Crook and Haughton Justices, contrary, for if 10 l. be arrear, the Rent of 20 l. is arrear; for Haughton said, In an Assise of Rent of 40 l. where part is arrear, yet he ought to bring his Assise for the whole Rent of 40 l. for the Will ought to agree with the Deed.

Doderidge agreed with him in the case of an Assise, but not in the principall point.

And

And for the second point it was agreed by them all, that upon the entry of the Grantee, he shall have a free-simple determinable, admitting the entry for the 10 l. to be good.

*The same Term in the same Court, and it is entred, 14 Jac.
Rot. 1484.*

Robinson *versus* Walter.

Robinson brought an Action of Trover and Conversion against Walter, and upon the whole matter the case appeared to be this.

A Stranger took the horse of the Plaintiff, and sent him to a common Inn, and there he remained for the space of half a year, at which time the Plaintiff had notice where his Horse was, and thereupon he demanded him of the Inn-keeper, who answered that a person unknown left the Horse with him, and said, that he would not deliver the Horse to the Plaintiff unless he would pay for his meat, which came to 3 l. 10 s. for all the time, and also would prove that it was his Horse, upon which the Plaintiff demurred in Law.

An Inn-keeper may detain a Horse until he be satisfied for meat, albeit he be left by a stranger.

And it was resolved by Mountague chief Justice, Crook, and Doderidge, Justices (Haughton Justice dissenting) that the Defendants plea was good, for the Inn-keeper was compellable to keep the Horse, and not bound at his peril to take notice of the Owner of the Horse. And by the custom of Lond. if a horse be brought to a common Inn, where he hath (as it is commonly said) eaten out his head, it is lawfull for the Inn-keeper to sell him, which case of the custom implies this case. And there is a difference where the Law compels a man to do a thing, and where not; As if the Lieutenant of the Tower brings an Action of debt for Wyet against one who was his Prisoner, in this case the Defendant cannot wage his Law, because the Law compels the Lieutenant to give Victuals to his Prisoner, otherwise if another man brings an Action of debt for Wyet, and in the case at the Bar the Inn-keeper was compellable. And Doderidge said, that if the Law were as the Plaintiff would have it, it were a pretty trick for one who wants a keeping for his Horse. And Mich. 6 Jac. in the Kings Bench, between Harlo and Ward, the like was resolved as was cited by Barkefelds of Counsell with the Defendant.

Mich. 14. Jac. In the Kings Bench.

Rawlinson *versus* Green.

A Copyholder surrendered out of Court, according to the custom of the Mannor, which at the next Court was presented, and entry thereof made by the Steward, Scilicet. Compertum est per homagium, &c. but no admittance; Afterwards Cestuy que use surrenders before admittance, and the first Copyholder surrenders to the Plaintiff: And in this case there were two questions.

1. Whether he may surrender before admittance?
 2. Who shall have the Land? whether the first Copyholder, or the Lord?
- Haughton Justice held that he could not surrender before admittance, and the

A surrender
of Copyhold
cannot sur-
render before
admittance.

the entry of the surrender doth not make an admittance, for this being the sole act of the Steward, shall not bind the Lord, and it is not like to the usuall form of an admittance, for that is, Dat Domino de fine fecit fidelitatem & admissus est inde tenens. Doderidge Justice agreed and said, that in Hare and Brickleys case, the admittance of a Copyholder was compared to the induction to a Benefice which gives the possession.

Hillary 14. Jac. In the Kings Bench.

Sir John Pools Case.

Three Executors brought an Action of Debt, and one only declared, and they were ready for a triall in the Country, and now it was moved that the Declaration might be amended, and the names of the other Executors inserted: but per Curiam this cannot be without the assent of the parties.

Pasch. 15. Jac. In the Kings Bench.

Cooper versus Smiths.

Action for
these words,
Thou hast kil-
led thy Masters
Cook.

An Action upon the Case was brought for these words; viz Warerman, and thou (Innuendo the Plaintiff) hast killed thy Masters Cook Innuendo, &c. and I will bring thee in question for thy life: And after Verdict for the Plaintiff, it was moved in Arrest of Judgment by the Counsell of the Defendant, that the words were not actionable for the uncertainty, inasmuch as it doth not appear who was his Master, nor that his Master had a Cook.

Innuendo can-
not make a
thing that is
uncertain
certain.

Mountague chief Justice said, that the words were actionable, and albeit an Innuendo cannot make a thing that is uncertain certain, but shall serve as a Predict, yet the words import that he had a Master, and that his Master had a Cook, to which all the Court agreed, and Judgment was given for the Plaintiff.

Thou hast sa-
crificed thy
child to the
Devill.

And another Action was brought for these words, Scil. Thou hast sacrificed thy Child to the Devill; and adjudged that the words were actionable.

Mich. 15. Jac. In the Kings Bench.

Lee versus Brown.

Whether co-
pyhold Lands
may be intail-
ed.

If an Ejectione firmæ brought by Lee against Brown, the Case was this. Tenant in Tail of Copyhold Land surrendered the same into the hands of the Lord, to the use of J.S. wherupon two points did arise. 1. Whether Copyhold Land be within the Statute of Donis conditionalibus, so that it may be intailed. 2. Whether the Intail may be cut off by the surrender.

Doderidge Justice said, as to the first point, that it hath been a great doubt, whether it may be intailed, but the common and better opinion was, that by the same Statute co-operating with the custom it may be intailed, and with this

this agrees Heydons case in my Lord Cokes 3. Report, and so was the opinion of the Court.

And for the second point, their opinion also was, that it could not be cut off by surrender, unlesse it were by speciall custom, and they directed the Jury accordingly: And it was said to maintain this custom, it ought to be shewn that a Formedon had been brought upon such a Surrender, and Judgment given that it doth not lye; yet it was agreed that it was a strong proof of the custom, that they to whose use such Surrenders had been made, had enjoyed the Land against the Issues in Tail: And it was said by the Counsell of the Defendant, that there was a Verdict for them before in the same case, which they could prove by witnesses, but the Court would not allow such a proof because it was matter of Record, which ought to be shewn forth.

An Intail of copyhold land not to be cut off by surrender, unlesse by speciall custom.

In the same Term in the Common Pleas.

May *versus* Kett.

An Action upon the Case was brought for these words; viz. Thou hast stollen my Corn out of my Barn; And it was moved in Arrest of Judgment, because he had not said how much he had stollen, and perhaps it was of small value: and yet it was adjudged that the Action would lye, for it is at least petit Larceny: But if he had said, that he had stollen his Corn generally, it had not been actionable, for it might have been growing, and then it had been but a Trespasse.

Words.
Thou hast stollen my Corn out of my Barn.

The same Term in the Star Chamber.

Riman *versus* Bickley, and others.

Iohn Riman exhibited a Bill in the Star Chamber, against Thomas Bickley, and Anne his Wife, Dr. Thorn, Mr. Goulding, and others Defendants, the said Anne was first married to Devenish Riman the Plaintiffs Son, and between them were many jars and disagreements, and the said Devenish was much given to drinking, and other Vices, and divers times did beat and abuse his Wife, and was also jealous of the said Thomas Bickley, and his Wife being at a certain time at Supper with Dr. Thorn, Goulding, and others, spake such words as these (having communication that her Husband did beat and abuse her) to wit, That she heard that his Father had that quality, and being once whipt for it, was the better ever after, and that if she thought it would do her Husband any good, she would willingly bestow 40 s. on some body to give him a whipping wherupon Goulding said, that he would give him a Medecine for his Malady, and within two daies after he came in the night in womans apparrell, with a Weapon under his Cloak, and with a Rod, and went into the House and Chamber of the said Devenish, and would have whipped him, and in striving together, there was some hurt done on either side, but Goulding not being able to effect his purpose, fled, and this was conceived to be by the procurement of Anne his wife: And not long after Devenish fell sick, and sent to his said wife for certain necessaries, which she would not send him, and presently after Devenish died, and she refused to come to his buriall.

¶ 1

And

And although it were much disliked that Devenish should abuse his Wife in such uncivil manner, as to strike and beat her, and (as Coke late chief Justice said) it is not lawfull by the Act Military for one man to strike another in the presence of Ladies, yet it was resolved by the whole Court, that it was a great misdemeanour in the Wife, and uncivil and unbecomfull carriage in her to do so to her Husband, as they use to do to Children or fools, to wit, to give them the Whip, and so to disgrace and take away the good name of her Husband, which, viz. A mans good name and his Children, are the two things which make a man live to Posterity; as was said by Sir Francis Bacon Lord Keeper: and the Court fined the Wife 500 l. and it was said, that Thomas Bickley her now Husband well deserved to pay this Fine, because he was too familiar with her in the time of his Predecessor, and as the Bishop of London said, Devenish Rimon lay upon her hands, and Thomas Bickley upon her heart: And to aggravate this matter, a Letter was shown which Devenish Rimon wrote to his Wife, in which he called her Whoo, and told her somewhat roundly of her faults, and she wrote back to him in the Margent, that he lyed, and wished him to get a better Scribe for his next Letter, for he was a Fool that wrote that, wherein she called him Fool by craft: And Goldings offence was accounted the greater, because he was a Minister, so that he was fined 500 l. also: And Coke said, that the course of this Court was, that if any were fined who is not able to pay it Respondeat superior, he that is the principall and chief agent therein must answer it, for otherwise poor men might be made Instruments of great mischief, who are not able to answer, and the greater Offenders shall escape, which the Lord Keeper confirmed. And as to Doctor Thorne he was acquitted by all: And the Bishop of London said, that they had thought to have trod upon a Thorn, and they gat a Thorn in their foot: And by Coke, if Devenish Rimon had doted upon it, it had been capitall in the Wife who procured it, for it was an unlawfull Act.

The same Term in the Kings Bench.

Wescot *versus* Cotton.

Where an Infant Executor may declare by Attorney, but not defend by Attorney, but by Guardian.

The case was this. An Infant Executor upon an Action brought against him appeared by Attorney, where he ought to appear by Guardian, and it was resolved by the Court that this was Error, for this doth much concern the Infant, in as much as by his false plea he shall be bound to answer of his own Goods, if he hath no Goods of his Testator, and therefore in a 11 C. 4. 1. he hath remedy against his Guardian for pleading a false Plea.

And by Doderidge, if he hath no Guardian, the Court shall appoint him a Guardian. And if an Infant bring an action as Executor by Attorney, and hath Judgment to recover, this is not erroneous, because it is for his benefit; so per Curiam, the difference is where he is Plaintiff, and where he is Defendant: And there is another difference where he is Executor, and where not, for being Executor, his Plea might have been more prejudiciall to him, and Coke lib. 5. Russels case was agreed for good Law, for an Infant may be Executor, and may take money for a Debt, and make a Release and give an Acquittance, but not without a true consideration and payment of the money.

The same Term in the same Court.

Thomas Middletons Case.

Thomas Middleton, alias Strickland was condemned for a Robbery at the Assises in Oxford, after which he made an escape, and being taken again he was brought to the Bar, and upon his own confession that he was the same party who did the Robbery, and that he was condemned for it, the Court awarded execution: And Mountague chief Justice said, that was no new case, for it had been in experience in the time of E. 3. and 9 H. 4. and 5. E. 4. that the Court might so do upon his own confession: And because the Sheriff of Middlesex did not give his attendance upon the Court in this case, nor came when he was called, the Court fined him 10l. And Mountague said, that it shall be levied by process out of the Court, and also all other fines there assessed and not estreated into the Exchequer, for then the party might compound for a matter of 20 s. and so the King be deceived.

Where a Felon is condemned, and escapeth, and is re-taken, upon confession that he is the same party, execution may be awarded. The Sheriff of Middlesex fined for not attending the Court.

The same Term in the same Court.

Gouldwells Case.

John Gouldwell seised of Land in Socage Tenure devised them to his Wife for life, the Remainder to John Gouldwell his Son, and his Heirs, upon Condition that after the death of his Wife he shall grant a Rent-charge to Steven Gouldwell and his Heirs, and if John Gouldwell dye without Heirs of his body, that the Land shall remain to Steven Gouldwell in Tail; the Wife dieth, John Gouldwell grants the Rent accordingly, Steven Gouldwell grants the Rent over: John Gouldwell dies without Heir of his body, and the second Grantee distrains for the Rent arrear, and Steven Gouldwell brings a Replevin: And it was urged by the Counsell for the Plaintiff that this Rent shall not have continuance longer then the particular Estate, and cited 11 H. 7. 21. Edricks case, that if Tenant in Tail acknowledge a Statute this shall continue but during his life: and Dyer 48. 212. But it was agreed per Curiam that the Grantee was in by the Devisor, and not by the Tenant in Tail, and therefore the Grant may endure for ever.

But for the second point, this being to him in Remainder, the intent of the Devisor is thereby explained that he shall have the Rent only untill the Remainder come in possession, for now the Rent shall be drowned in the Land by unity of possession.

3. It was agreed and resolved, that by the granting of the Rent over this was a confirmation. And Mountague said, that it was a confirmation during the Estate Tail, and shall enure as a new grant afterwards: And Haughton and Doderidge said, that they would not take benefit of the grant over by way of confirmation, for as Haughton said, this enures only ought of the Devisor, and he hath power to charge the Land in what manner he pleaseth, and it is like to an usuall case, as if a man makes a Feoffment in Fee to the use of one for life, the Remainder over, with power to make Leases, and after he makes a Lease, this is good against Tenant for life, and him in the Remainder also: And I have considered what the intent of the Devisor should be in granting of this Rent, and it seems to me, that in as much as the Land is limited in Tail, and the Rent in Fee, that by this the Grantee shall have power to grant or dispose of the Rent in what manner he would; but

but if the Land had been in Fee, I should have construed his intent to have been, that the Grantee should have the Rent only untill the Remainder fall; to which Doderidge agreed, who said, that we are in the case of a Will, and this construction stands with the intent of the Devisor, and stands with the Statute, which saies, Quod voluntas Donatoris est observanda.

The same Term in the same Court.

Baskervill *versus* Brock.

Difference
between baile
in the Kings
Bench and
the Common
Pleas.
And how a
baile shall re-
late.

A Man became Bail for another upon a Latitat in the Kings Bench, and before Judgment, the Bail let his Lands for valuable consideration: And afterwards Judgment was given for the Plaintiff. And now it was debated, whether the Land Leased shall be liable to the Bailment: and it was said by Glanvill of Councell with the Lessee, that it ought not to be liable, and he put a difference between a Bailment in this Court, and a Bailment in the Common Pleas, for there the Suit cometh by original, and the certainty of the debt or demand appeareth in the declaration, and therefore then it is certainly known from the beginning of the Bailment for what the Bail shall be bound: But in this Court upon the Latitat, there is not any certainty untill Judgment given, before which the Land is not bound, and now it is in another mans hands, and therefore not liable, and he puts Hoes case, Co.lib. 5. 70. where it was resolved that where the Plaintiff releaseth to the Bail or the Defendant upon a Suit in the Kings Bench before Judgment, all Actions, Duties, and Demands, that this Release shall not bar the Plaintiff, for there is not any certain duty by the Bail before Judgment, and therefore it cannot be a Release, and he cited the case of 21 E. 3. 32. upon an account, and said that it was like to a second Judgment, in that which reduceth all to a certainty, and therefore &c.

But it was said by Mountague and Crook, that the Lessee shall be bound: for otherwise many Bailments and Judgments shall be defeated, which will bring a great Inconvenience: And Mountague said, that it was like to the case of a bargain and sale of Land, which after it is Inrolled, within six moneths shall relate to the beginning of the Bargain, so upon the Judgment given, relation is made from the time of the Bailment. But Haughton being contra, therefore, Curia advisare vult.

The same Term in the same Court.

The Earl of Shrewsburies Case.

In the discre-
tion of the
chief Justice
to allow a
Writ of Er-
ror,
The entry of
a Judgment
how it shall
relate.

Vpon a Verdict, a rule was given to have Judgment, and this was upon the Thursday, and upon Saturday after the party that was Plaintiff died, and it was moved to have a Writ of Error, because it was said, that the party died before Judgment, in as much as of course after the Verdict, and the rule given for Judgment, there are four daies given to speak in Arrest of Judgment; and so as Yelverton Attorney generall said, he died before Judgment absolutely given: and he moved the Court to have a Superseas: And it was agreed that it was in the discretion of the chief Justice, Ex officio, to allow a Writ of Error, but because it was a cause of great consequence, he took the advice of the Court, and it was agreed that a Writ of Error was a Superseas in it self, yet it is good to have a Superseas also; and if the Writ of Error had been allowed, the Court could not deny the party

ty a Supersedeas: But because the writ of Error was not allowed, and also because no Error appeared to the Court, for where Judgment is entered, this shall relate to the time of the rule given: It was resolved that no writ of Error should be allowed, nor any Supersedeas granted.

The same Term in the same Court.

Rones Case.

In an Ejectione firmæ brought by the Lessee of Rone, Incumbent of the Church of Dallinghoe in Com. Suff. It was found by speciall Verdict, that the King was the true Patron, and that Wingfeild entered a Caveat, in vita Incumbentis, he then lying in Extremis, scilicet, Caveat Episcopus ne quis admittatur, &c. Nisi Convocatus, the said Wingfeild; the Incumbent dies, Nauntou a stranger presents one Morgan who is admitted and instituted, afterwards the said Wingfeild presents one Glover who is instituted and inducted, and afterwards the said Rone procure a presentation from the King who was instituted and inducted, and then it came in question in the Spirituall Court who had the best right, and there sentence was given that the first institution was irrita vacua & inanis, by reason of the Caveat, & then the Church being full of the second Incumbent, the King was put out of possession, and so his presentment void: But it was adjudged and resolved by all the Court for Rone, for 1. It was resolved that this Caveat was void, because it was in the life of the Incumbent. 2. The Church upon the Institution of Morgan was full against all but the King, and so agreed many times in the Books, and then the presentation of Glover was void by reason of the superinstitution, and therefore no obstacle in the way to hinder the presentation of Rone, and therefore Rone had good right: And if the second institution be void, the sentence cannot make it good, for the Spirituall Court ought to take notice of the Common Law, which saith, that Ecclesia est plena & consultata, upon the institution, and the person hath thereby Curam animarum. And as Doderidge Justice said, he hath by it Officium, but Beneficium comes by the Induction: And although by the Spirituall Law the institution may be disannulled by sentence, yet as Linwood saith, Aliter est in Anglia, who is an Author very well approved of amongst the Civilians: And Doderidge put a case out of Doctor and Student, the second Book: If a man devise a summe of money to be paid to I. S. when he cometh to full age, and afterwards he sues for it in the Spirituall Court, they ought to take notice of the time of full age, as it is used by the Common Law, to wit, 21. and not of the time of full age as it is used amongst them, to wit, 25. So in this case at the Bar, for when these two Laws met together, the Common Law ought to be preferred: And when the Parson hath institution, the Arch-deacon ought to give him Induction: And see Dyer 293. Bedingfeilds case cited by Haughton to accord with this case.

The same Term in the same Court.

Taylors Case.

John Taylor a Citizen and Alderman of Gloucester, was put out of his place by the Common Counsel of the City, for some misdemeanoꝝ, and he sued out

D m
a writ

Writ of Re-
stitution for
an Aldermans
place.

a Writ of Restitution, and for that the cause of his displacing was not sufficient his Writ was allowed, by reason wherof the other Alderman who was elected in his place was to be removed, for the number of Aldermen was full: But Hazard another Alderman, to the end that the new elect (who now was Page) should not be displaced, was contented to surrender his place, in consideration of 10 l. a year granted to him by the Corporation for term of his life, with which the Wife of Hazard was not content, and therefore he would have left his agreement: And therupon the question was, whether he might surrender, or not: And it was said by Coventree Solicitor, that he cannot; and he cited Middlecots case an Alderman of B. where the opinion of the Court was, 13 El. 2. that he cannot surrender: Doderidge, perhaps they would not except his surrender: Mountague said, that Alderman Martin of London, gave up his Aldermans place, and without question any man in such a case may surrender or leave his place, to which the Court agreed, and therefore it was ordered that Hazard shall have his 10 l. a year, and that he shall stand to his first agreement.

The same Term in the same Court.

May and Samuels Case.

Arbitrement.

An action of Debt was brought upon an Obligation, the Condition wherof was to stand to the Arbitrement of John S. concerning all matters between them to the time of the submission, who arbitrates that the one shall pay 20 s. and that the other shall make a generall release to him of all matters, from the beginning of the world to the time of the arbitrement.

Haughton Justice, this is an arbitrement but of one part, and therefore void, but if it had been only that the one shall pay 20 s. it may be good, for it shall be intended that the other by reasonable construction shall be discharged or acquitted, to which Crook and Doderidge Justices agreed. But by Mountague chief Justice, it ought to be specified; yet they all agreed, and so it was adjudged that this was a void arbitrement, for it was of the one part only, to wit, that he shall pay 20 s. for the other part for the release to the time of the arbitrement was not within the submission; so if the arbitrement had been, that the one shall make a release, or shall be discharged or acquitted without speaking of the other, this being on the one part only is a void arbitrement, vide Co. lib. 8. Baspoles case, and 7 H. 6. 40. accordingly.

The same Term in the same Court.

Vaughans Case.

Thomas Dedham had to Apprentice one Holland, who got his Pathe with Child, and afterwards departed from his Masters Service, and staid a whole night with Vaughan his Kinsman, and Dedham procured a Warrant from S. Stephen Soame a Justice of Peace, that the Constable should bring the said Apprentice to order according to Law, and because that Vaughan perswaded him to withhold himself, so that he should not be taken by virtue of the Warrant he was indicted.

And it was agreed that it was lawfull for Vaughan to lodge and relieve him, albeit he knew his misdeeds, they being no Treason or Felony: But
Haughton

Haughton Justice took exception to the Inditement, because no place appeared where he perswaded him to withdraw himself from the Warrant, or in truth that he did hide himself from the Warrant, for if he did not so, the perswasion was nothing.

And Doderidge took another exception to the Warrant, because the Statute saith, that two Justices, of which one of them shall be of the Quorum, shall proceed in such cases against the Malefactor, and that they shall compell the party to allow means for the education of the Infant, or otherwise the Offendor shall suffer corporall punishment, and so this Warrant not being speciall according.

Pasch. 16. Jac. In the Star Chamber.

Wrennums Case.

Sir Henry Yelverton Attorney-generall, exhibited an Information in the Star Chamber, against one Wrennum, Ore tenus, because he had divers times petitioned the King against Sir Francis Bacon Lord Chancellor, pretending that the said Lord Bacon had done great Injustice to him, in granting an Injunction, and awarding Possession of Land against him, for which he had two decrees in the time of the former Chancellor: And also he made a Book of all the proceedings in the said cause between him and one Fisher, and dedicated and delivered it to the King, in which he notoriously traduced and scandalised the said Chancellor, saying, that for this unjust decree, he, his Wife and Children were murdered, and by the worst kind of death by Starving: And that now he having done unjustly, he must maintain it by speaking untruths, and that he must use his authority, Wit, Art, and Eloquence, for the better maintenance thereof, with other such like scandalous words: And the Attorney cited a president, 2 Jac. Where one Ford for an offence in the like manner against the late Chancellor was censured in this Court, that he should be perpetually imprisoned, and pay the fine of 1000 l. and that he should ride upon a Horse with his face to the tail, from the Fleet to Westminster, with his fault written upon his head, and that he should acknowledge his offence in all the Courts at Westminster, and that he should stand there a reasonable time upon the Pillory, and that one of his ears shall be cut off, and from thence shall be carried to Prison again, and in the like manner should go to Cheapside, and should have his other ear cut off, &c. And because they conceived that the said Wrennum had wronged the said Lord Chancellor in the said suggestion, they all agreed in his censure according to the said President: See for such matter, 19. Ass. 9 H. 8. Sir Rowland Heywards case, and 21 H. 8. Cardinall Wolseys case.

The same Term in the Kings Bench.

Mingies Case.

A writ of Annuity was brought by Mingy, which was granted, Pro Consilio impenso & impendendo, the Defendant pleaded in Bar that he carried a Bill to the Plaintiff, to have him set his hand to it, and because he refused he detained the said Annuity: And per Curiam this is no plea, for he

Annuity pro
Consil. impenso
&c.

is

is bound to give advice, but not to set his hand to every Bill, for this may be inconvenient to him.

The same Term in the same Court.

Notice where
requisite.

The Case was this: A Lessee for years was bound in a Bond to give up the possession of the Land demised to the Lessor, or his Assigns, at the end of the Term, the Lessor assigns over his Interest, and the Assignee requires the Lessee to perform the Condition, who answers, that he knew not whether he were the Assignee, and thereupon refuseth: And the question was, whether he had broken the Condition, and it was adjudged that he had, for he hath taken upon him so to do, and it is not like a Condition annexed to an Estate, as Co. lib. 5. Mallories case, 62 Co. lib. 6. Greens case, where the Patron presented his Clerk to a deprivation, yet the Ordinary ought to give the Patron notice of the deprivation; for it is a thing Spiritual, of which a Lay-man shall not be bound to take notice.

Deadand.

It was moved, that a man riding upon a Horse through the water was drowned, and by the Coroners Inquest it was found that his death was caused, Per cursum aquæ, and the Horse was not found a Deodand, and per Curiam they did well, for the water, and not the Horse was the cause of his death.

The same Terme in the same Court.

Wooton *versus* Bye.

Release of all
Demands
bars a future
Rent.

The case was this: A man made a Lease for years, rendring Rent, and upon payment of the Rent the Lessor made an Acquittance, by a release of all Actions, Duties, and Demands, from the beginning of the World to the day of the date: And whether the Rent to come were released by it, was the question: And it was moved by Crook at the Bar, that it was not, for a Covenant in future shall not be released by such words, yet a release of all Covenants will be good in such a case, as the Book is in Dyer 57. so Hoes case, Co. lib. 5. 70. b. such a release will not discharge a Bail before Judgment. But it was answered and resolved by the Court, that such a Release will discharge the Rent, to come for this word (Demand) is the most large and ample word in a Release that may be, as Littleton saith, and in Co. lib. 8. Althams case, and in Hoes case, Co. lib. 5. one was Bail for the Defendant, the words wherof are conditionable, Scil. Si contigerit predict. defendent. debet & damna illa prefat. Quer. minime solvere, &c. So that before Judgment it is altogether uncertain, and therefore cannot be released, but in the case at the Bar he hath Jus ad rem, though not in re, as Crook Justice said.

The same Term in the same Court.

Bret *versus* Cumberland.

1. Roll. Ab. 518.

Co. Jac. 399, 521

In a Writ of Covenant the case was thus: Queen Elizabeth by her Letters Patents made a Lease of certain Mills, rendring Rent, in which Lease were

were these words, to wit, That the said Lessee his Executors, Administrators, and Assigns, should from time to time repair the Mills, and so leave them at the end of the Term, the Lessee assigns over his Term, the Queen also grants over the Reversion, the first Lessee dies, and the Grantee of the Reversion brings a Writ of Covenant against his Executors; In which case there were two points. 1. Whether these words, And the said Lessee his Executors, Administrators, and Assigns, shall from time to time, &c. make a Covenant, or no. 2. Whether (as this case is) it will lye against the Executors of the Lessee.

3 Bulst. 162
1 Roll. Rep. 359
2 Roll. Rep. 63

Whether Covenant lies against the Executor of a Lessee after assignment.

Ante 120.

As to the first point it was agreed that it is a Covenant, for being by Indenture it is the words of both parties, and it is more strong being in the case of the Queen.

Haughton said, that 25 H. 8. Tit. Covenant. Covenant will lye against a Lessee after assignment, but Debt lyeth not for Rent after the Lessee hath accepted the Assignee for his Tenant, and therefore it seems that by the express words of the Covenant that the Action lies.

Doderidge Justice contra, for between the Queen and the Lessee there is privity of Contract, and also of Estate, so that the Queen her Heirs and Successors might have had an action against the Lessee or his Executors, upon the privity of Contract; and where the Lessee assigns over, the privity of Contract remains, but the privity of Estate is gone to the Assignee, and now when the Queen grants over the Reversion, the privity of Contract is utterly determined, whereby the Action of Covenant cannot be maintained against the first Lessee, or his Executors, who are more remote: to which Mountague chief Justice agreed, see 2 H. 4. 6 H. 4. 1. and Co. lib. 3. Walkers case, and the Judgments there cited, Et adjournator.

The same Term in the same Court.

Bennet *versus* Westbeck.

The Case was thus: Tenant for life, Remainder for life, Reversion in Fee, he in Remainder for life gives his Deed of Demise (with the assent of the first Tenant for life) upon the Land to a stranger in the absence of the Lessor, and said, that he surrendered to him in Reversion: And it was said, that this Surrender being without Deed was not good to him who was absent, and to confirm it, the case was put out of 27 H. 8. Where Mountague chief Justice said, that if a Feoffment be made to four, and Liberty is made to one in the absence of the other, but in name of all, if it be by Deed this shall enure to all, but if it be without Deed, then only to him to whom the Liberty was made: So here this Surrender doth not enure to him in the Reversion, being absent.

But Non allocatur, for the sole point now in question, was, whether he in Remainder for life can surrender without Deed, and as to it this Rule was taken; viz. That that which cannot commence without Deed, cannot be granted without Deed, as a Rent, Reversion, common Advowson, &c. as 19 H. 3. 14 H. 7. 3. 1. & 2. Ph. & Mar. 110. 22. Ass. Pl. 16. But in this case this took effect by Liberty and not by Deed, and therefore might be determined without Deed.

Whether Tenant for life in Remainder may surrender without Deed.

Mountague and Haughton agreed that it might be surrendered without Deed, because it had its beginning without Deed, but it could not be granted over without Deed.

Doderidge Justice said, that it could not be surrendred without Deed, but he said, that Tenant in possession may, or Tenant for life, and he in Remainder together may surrender to him in the Reversion, but this shall inure as two severall Surrenders, first of him in Remainder to the Tenant for life, and then by the Tenant for life to him in the Reversion.

Crook Justice agreed with Doderidge, for the Estate of him in Possession is an Estoppel to the Surrender, so that it could not be surrendred without Deed.

The same Term in the same Court.

Thurman *versus* Cooper.

In an Ejectione firmæ brought by John Thurman against William Cooper, upon the whole matter the case was thus: Lands were given to a man and woman (who afterwards inter-marry) and to their Heirs and Assigns, Habendum to them and to the Heirs of their two bodies engendered, the remainder to them and the Survivor of them, with warranty to them and their Heirs and Assigns for ever. And the question was what Estate this shall be? whether an Estate-tail or Fee-simple? or a Fee-tail with a simple Expectant? And it was said that this shall be an Estate-tail only, for the Habendum qualifies the generall words precedent, and with this agrees Perkins 35. b. and Co. lib. 8. 154. b. Althams case: But it was answered and resolved by the whole Court, that this is a Fee-tail with a Fee-simple expectant; and they observed these Rules.

1. That every Deed shall be taken most strong against him that made it.
2. That every Deed shall be construed according to the intent of the maker, so that all the parts may be effectually if they can stand together with the Rules of Law, 40 E. 3. 5, Percy saith, that it is a Fee-simple, 21 H. 6. 7. that it is an Estate-tail with a Fee-simple expectant, Dyer 160. and Plow. Paramon, and Yardleys case, the Law shall make an order of words where there is no order put by the parties; and the words after the Remainder limited, are Tenendum de Capitalibus Dominis feodi, &c. and therefore it ought to be a Fee-simple, for if it were a Fee-tail, he should hold of the Donor, as it is in Co. lib. 6. Sir John Molins case, and other Books: And although the Warranty cannot enlarge an Estate, yet this expresses his intent to passe a Fee-simple, and the Law shall make a construction that the Fee-tail shall precede, upon which the Fee-simple shall be expectant, according to that which is before said, in Paramore and Yardleys case.

Doderidge, If the Habendum had been to a stranger, the Premises had been but a Tail, as 7 H. 4. for otherwise the Habendum shall be void: But if Land be given to one and his Heirs (viz. In Tail, or if the said Donor dye without Issue of his body, this had been but an Estate-tail only, because it immediately checks and confirms the Premises, to which Haughton agreed, Et adjournator.

The same Term in the same Court.

Powels Case.

Powel an utter Barister of the Temple, and also Town-Clerk of Plimoth, brought an Action upon the Case against ^{for these} words; The Defendant supposing that the Plaintiff had wronged him in the Court of Plimoth, said, that he was a Puritan Knave, a precise Knave, a bribing Knave, a corrupted Knave, and that he would make him answer for that which he had done in another place: And after Verdict for the Plaintiff, it was now moved in Arrest of Judgment that the words were not actionable, because he doth not scandalize him in his Profession by which he acquires his Living.

Words,
That he was a
Puritan Knave,
a precise
Knave, a bri-
bing Knave, a
corrupted
Knave, &c.

And Mountague chief Justice said, that this word bribing doth not import that he took a Bribe, and therefore this word and all the other words, but (corrupted Knave) are idle, but these words impeacheth him in his Office, for it hath reference to that, and therefore is actionable: And Judgment was given accordingly.

The same Term in the same Court.

Sir Baptist Hickes Case in the Star Chamber.

Sir Baptist Hickes having done divers Pious and Charitable Acts, to wit, had founded at Camden in Gloucestershire, an Hospitall for twelve poor and impotent men and women, and had made in the same Town a new Bell tunable to others, a new Pulpit, and adorned it with a Cushion and Cloath, and had bestowed cost on the Sessions House in Middlesex, &c. one Austin Garret a Coppelholder of his Mannor of Camden, out of private malice had framed and writ a malicious and inventive Letter to him, in which in an ironical and deriding manner, he said, that the said Sir Baptist had done these charitable works, as the proud Pharisee for bawling and ostentation, and to have popular applause, and further in approbrious manner taxed him with divers other unlawfull Acts: And it was resolved by the Court that for such private Letters an Action upon the case doth not lye at Common Law, for he cannot prove his case, to wit, the publishing of it, but because it tends to the breach of the Peace it is punishable in this Court, and the rather in this case, because it tends to a publike wrong, for if it should be unpunished, it would not only deter and discourage Sir Baptist from doing such good Acts, but other men also who are well disposed in such cases; and therefore (as the Arch-bishop observed) this was a wrong, 1. To Pietie, in respect of the cost bestowed on the Church. 2. To charity, in regard of the Hospitall. 3. To Justice in consideration of the Sessions House; and these things were the more commendable in Sir Baptist, because he did them in his life time: For as Mountague chief Justice observed, they who do such acts by their Will, do shew that they have no will to do them, for they cannot keep their Goods any longer. And he only took a diversity where such a Letter concerns publike matter as they did, or private in which case it is not punishable.

Where a private Letter is punishable as a Libell.

But the Lord Coke said, that it was the opinion of the Judges in the Lord Treasurers case, when he was Attorney, that such a private Letter was punishable

nishable in this Court, and therupon he had instructions to exhibit an Information, but the Lord Treasurer Jacens in extremis was content to pardon him; and so it was resolved between Wootton and Edwards: And Sir Francis Bacon Lord Chancelloz said, that the reason why such a private Letter shall be punished, is, because that it in a manner enforceth the party to whom the Letter is directed to publish it to his friends to have their addice, and for fear that the other party would publish it, so that this compulsary publication shall be deemed a publication in the Delinquent; and in this case the party was fined at 500 l.

The same Term in the same Court.

Bernard *versus* Beale.

Words,
That the
Plaintiff had
two Bastards
36. years since

A Action upon the case was brought for these words; viz. That the Plaintiff had two Bastards 36. years ago, upon the report wherof he was indanger to have been divorced: And it was resolved that for Defamation there was no remedy but in the Spirituall Court, if he had no temporall losse therby, and therfore it is not sufficient to ground an Action to say, that he was in danger to be divorced, but that he was De facto, divorced, or that he was to have a presentment in marriage, as it is in Anne Devies case, Co. lib. 4.

The same Term in the same Court.

Brabin and Tradums Case.

A Prohibi-
tion for a Sea
in the Church

The Case was, That the Church-wardens of D. had used time out of mind to dispose and order all the Seats of the Church, wherupon they disposed of a Seat to one, and the Ordinary granted the same Seat to another and his Heirs, and excommunicated all others, who afterwards should set in the Seat, and a Prohibition was prayed and granted, for this grant of a Seat to one and his Heirs is not good, for the Seat doth not belong to the person, but to the house, for otherwise when the person goes out of the Town to dwell in another place, yet he shall retain the Seat, which is no reason, and also it is no reason to excommunicate all others that should set there, for such great punishments should not be imposed upon such small Offenders, an Excommunication being *Traditio diabola*.

In the same Term in the same Court.

Fulcher *versus* Griffin.

A Parson co-
venant that
his Parishio-
ners shall pay
no Tithes.

The Parson of D. covenanted with one of his Parishioners that he should pay no Tithes, for which the Parishioner covenanted to pay to the Parson an annuall summe of money, and afterwards the Tithes not being paid, the Parson sued him in the Court Christian, and the other prayed a Prohibition: And it was agreed, that if no interest of Tithes passe but a bare Co-venant,

tenant, then the party who is sued for the Tithes hath no remedy but a writ of Covenant: And the better opinion of the Court in this case was, that this was a bare Covenant, and that no interest in the Tithes passe.

The custody of a Copyholder that was a Lunatick, was committed to I.S. and for Trespasse done upon his Land, it was demanded of the Court in whose name J.S. should bring the action, and their opinion was, that it should be in the name of the Lunatick.

Darcies case
in the Com-
mon Pleas.

Baron.
197.

Trinity 16. Jac. In the Kings Bench.

The Earl of Northumberland's Case.

The Earl of Northumberland being seised of the Mannor of Thistleworth, in which he had a Leet to be holden twice a year, to wit, within a moneth after Easter, and a moneth after Michaelmas, and Henry Devell being a freeholder of the said Mannor erected a new Dove-coat at Heston within the Precinct of the said Leet, which was presented at the Leet for a common Nuisance, for which Devell was amerced 40s. and was commanded to remove it upon pain of 10 l. for the which a Distresse was taken by Henry Sanders and others, as Bailiffs to the said Earl, whereupon Devell brought a Replevin, and they made Abowry and justified as Bailiffs, and prescribed that they used to make by-laws to redresse common Nuisances, and also prescribed in the Distresse. And the point in question was, whether the new erecting of a Dove-coat by a freeholder were a common Nuisance, & punishable in the Leet: And it was resolved by the whole Court upon great deliberation, viz. Mountague chief Justice, Crook, Doderidge and Haughton Justices, that it was not a common Nuisance, either punishable or inquirable in a Leet; and by Haughton a man hath Jus proprietatis & privilegii in the Doves. 1. Propriety in respect of the place, as 22 H. 6. 39. Trespasse lies for taking a Goshawk in respect of the place, as 3 H. 6. 55. For Hares, and Spencers case in Dyer, and so of other things which are Fera naturæ. And if a Deer goes out of a Park, albeit it be in the Kings case, yet it is lawfull for the Owner of the Soil to take it, if it be in the place where the Deer hath chase and re-chase: And by the Register and Fitzherbert it appears that Trespasse lies Quære columbare fregit, & Columbas cepit: But 16 E. 4. 7. Trespasse doth not lye for killing of Doves, but there is a Quære of an action upon the case, and because the Doves do no Trespasse, neither is there any remedy for the killing of them, therefore they are no common Nuisance; for by Brook 34 H. 6. Brooks action upon the case, the common custom is the common Law, and there is no authority against it, but Co. lib. 5. 104. Boulstons case, which is only on the bye, and is not agreeing with the reason of the principall, and this confirms my opinion, Quod fiat concessum per totam Curiam, for there the principall case was that a man made Cony-burrows, and the Conies strayed into his Neighbour's grounds, and adjudged that it was not actionable; but it was lawfull for any man to kill them upon his own ground; so here, &c.

Whether the
erecting of a
Dove-coat be
a common
Nuisance.

Doderidge, It may be a hurt to the Common-wealth, but not a publique Nuisance, for that ought to be immediate, or generall.

1. Immediate it cannot be, for the erecting of a Dove-coat cannot in it self be a Nuisance.

2. It is not generall but particular to the Neighbouring Inhabitants: And it hath been allowed of all sides, that a man may have a Dove-coat by prescription

prescription, which could not be if it were a nuisance; to which Mountague agreed: And it is lawfull for any man to kill the Doves upon his own Land, but they must be ware that they do it not against any Statute, for Doves are preserved by many Statutes, as by the Statute of Wales, made in the time of E. 1. and the Statute of 18 E. 2. gives directions that the killing of Doves shall be presented at the Leet: And the Statute of 18 Eliz. ordains that Doves shall not be shot.

3. However the Replevin lies for a fault in the pleading, for the harm and nuisance which the Doves do is laid to be Per totam patriam, whereas it ought to be within the Precinct of the Leet; to which Mountague agreed.

Crook, A man hath property in the Doves only by the Possession, for being at large, they are Nullius in bonis, and when they are in his possession, to wit, in the Dove-coat, they do no harm to any: and it was lately ruled in this Court, that a man cannot lay Logs in the Kings high way, although there be sufficient room for Passengers, because it is a wrong to have the high way strained; so here a Prescription should not be good if it were a nuisance, for it is all one to erect a great Dove-coat, or a little one, for a nuisance Non recipit magis aut minus: And Bolstons case rather confirms then encreaseth my doubt, and so I agree with my Brethren.

Mountague, A man hath Jus duplex in Doves. 1. Jus proprietatis. 2. Jus privilegii, for they fly to and again, and (as Bracton saith) have Animum revertendi, and so have not other things which are Ferox naturæ: And it is a good Argument that this matter was never questioned, for it is without question. Littleton saith in the case of Disparagement, 21 E. 3. 4. They of the Leet ought to enquire of such things as have been enquirable, yet the excellence therof is restrainable by the Justices of Assise.

A Precept lies of a Dove-coat, as appears by the Writ, Mich. Col. and Dower and Partition lies therof, which shews it to be lawfull, and by the Book of 17 E. 4. 7. It seems that it is not lawfull to take Doves: And as a man cannot prescribe to do a nuisance, so the King cannot licence one to do it: And therefore I agree that Judgment shall be given for the Dove-coat.

Excesse of Dove-coats restrainable by the Justices of Assise.

The same Term in the same Court.

Richardson *versus* Cabell.

Richardson, being a Parson, libelled against Cabell in the Spirituall Court for Tithes, because the said Cabell being an Inn-keeper, took all the benefit of his Pasture by putting in Guest Horses into his Pasture, whereupon Cabell prayed a Prohibition, and it was not granted, for it is Tithable in this case: But if Cabell had taken a crop of Hay, and afterwards he had put Guest Horses into the Pasture, in that case it had not been Tithable, for he had his Tithe before, and thereby it should seem that some Crop is not Tithable.

Where tithes shall be paid for grasse of guest Horses.

The

The same Term in the same Court.

Southern *versus* How.

Ralph Southern Plaintiff in an Action upon the Case against Robert How, shews for his case, That the Defendant being a Goldsmith in London, and having Counterfeit Jewels, knowing them to be counterfeit, sent William Saldock his Servant with them to the Plaintiff, being a Merchant in Barbary, to use him for the sale of the Jewels to the King of Barbary, and the Plaintiff thereupon sold them to the King of Barbary for 800 l. and Saldock having received the said money, went from thence; And the Jewels being afterwards discovered to be counterfeit, the Plaintiff was taken and enforced by Imprisonment to make restitution of the money to the said King. But it was said by the Court, that the Verdict did not prove the case, for it was found that the Defendant did not command his Servant to make use of the Plaintiff, nor to sell to the King, but generally to any: And that the Jewels were of some worth, Scil. 80 l. And it was agreed at the Bar, by Davenport, that in this case the action well lies, for the Master shall answer for his Servant, Dyer 151. the Lord Norths case, 5 E. 4. 1. the Sheriff shall be amerced for the ill return of his Bailiff: And if I command my Servant to kill one, who commands another, in this case the Master shall not be punished, but in Trespasse all are principals, and 2 H. 4. 18. If a Servant burns his Masters house, wherby another house is burnt, there the Master shall answer for it, for 14 H. 8. 31. b. an Action upon the case lies where there is no other action provided for such a thing, so that an action well lies in this case, and see Doctor and Student 137. in what case the Master shall answer for his Servant.

Where a Master shall be answerable for his Servant, and where not.

Coventry Solicitor, to the contrary, for it was lawful for the Plaintiff to command his Servant to sell them, for it was found by the Verdict that the Jewels were of some worth and value, and he did not command him to sell them for more then they were worth, and 9 H. 6. 53. b. If the Master send his Servant into a Fair, or Market, to Merchandize for him, the Master shall not be punished for his fault. And in this case the command was not to deal with the Plaintiff, or to sell to any one in particular, and for it see 9 H. 6. aforesaid: And if the Servant will exceed the lawfull command of his Master, the Master shall not be punished therfore, but if the command be unlawfull it is otherwise, 11 E. 4. 6. A man sells cloath of such a length, which proves to be short of the length, an action lies not without a Warranty, so Fitz. N. B. 64. c. For Wine if it be warranted to be good, an action lies if it be corrupt. If my Beasts go into another mans Soil, an action lies against me, but if my Servant drive my Beast into another mans Soil, I shall not be punished, for he doth this of his own wrong, without any such warrant from me, 13 H. 7. b. And if when a man sell a thing for more then it is worth, an action would lye for it, we should never have an end of actions. And the action doth not lye for another reason, because it doth not appear that the King of Barbary did lawfully imprison the Plaintiff, 26 H. 8. 3. If a man makes a Lease, and covenants that he shall not be disturbed, if a stranger disturb him, an action lieth not against the Covenantor, so herr, &c. for it seems it was Ex regali potestate, and not in a lawfull manner, and so he concluded that the action will not lye, and so it was resolved by the whole Court.

Mountague chief Justice, the Plaintiff is no party who shall have the action,

action but the King of Barbary. 2. The Verdicts contrary to the Declaration, and Jewels are in value according to the estimation, and therefore 38 Eliz. between Simson and Sanders in the Star Chamber, it was resolved that a man shall not be punished for Perjury upon the valuation of Jewels.

Doderidge said, that 22 Eliz. an action upon the case was brought in the Common Pleas by a Clothier, that whereas he had gained great reputation for his making of his Cloath, by reason wherof he had great utterance to his great benefit, and profit, and that he used to set his mark to his Cloath, wherby it should be known to be his Cloath: And another Clothier perceiving it, used the same mark to his ill-made Cloath on purpose to deceive him, and it was resolved that the Action did well lye.

The same Term in the same Court.

A Certiorari
granted into
Wales.

Vpon an Indictment of Barretty befoze the Justices of Wales, a Certiorari was moved for to remove it into this Court: And it was said at the Bar that it had not been seen from the time of E. 1. that such a Writ had been granted in the like case, and therefore he collected that it ought not to be granted: But it was resolved by the Court, that a Certiorari should be granted, in regard it is in the Kings case; and by Haughton Justice, notwithstanding the Statute Quod communia placita non sequantur Curiam meam yet it is plain, that the King may sue in what Court he will: And albeit this Writ in such a case ought not to be granted in case of a common person, yet that is no reason but that it may be granted in the case of the King,

The same Term in the same Court.

Sir Henry Glemhams Case.

A Plea not to
be amended
in another
Term, with-
out assent of
parties.

In a Quo warranto against Sir Henry Glemham for using certain Liberties, to which Sir Henry pleaded in Bar, and the Kings Attorney replied, and so this matter rested three years, and then the Kings Attorney put in a new Replication, and joyned Issue upon other points: And it was moved for the Defendant that he might put in a new Bar, in regard the Replication is altered, and nothing was entred, but all remained in paper: And it was agreed by the Court that the King shall not be concluded but that he might put in his Replication at any time; And that the King cannot make a double Plea, for the other party shall answer first to one, and then to the other: And the Court would not allow Sir Henry to make a new Bar in this case, without the assent of the Attorney, who would by no means agree to it: And in case of a common person, this shall not be allowed without the assent of parties.

The same Term in the same Court.

Lamb and
Wooll inclu-
ded in small
Tithes.

In an Action of Trover and Conversion between one Nicholas Lamb and William Ward, it was agreed that tithe Lamb and Wooll was included within small Tithes: And Mountague said, that a Vicaridge endowed might be appropriated but not to the parson, to which Haughton and Doderidge agreed, 31 H.6. Fitz. tit. Indicavit, is that such a Vicaridge may be dissolved:

solbed: An appropziation may be by the King sole where he is Patron, but there is no Book that it might be by the Patron sole. Grindons case in Plowden, and 17 E. 3. 39. An Appropziation cannot be without the Kings licence.

The same Term in the same Court.

Blaxton *versus* Heath.

In an Action of Debt by Blaxton against Heath, the case was this. A man possessed of a term for twenty years, in right of his Wife, made a Lease for ten years, rendring rent to him, his Executors, and Assigns, and died. And the question was whether the Wife shall have the rent after his death, or his Executors, and it was argued, that the wife should not have it, because she was in by a Title Paramount; as if there be two Joynt-tenants for life, the one makes a Lease for years rendring rent, and dies, the other shall not have the Rent, Dyer 167. and so of Joynt-tenants in fee, Co. lib. 1. 96. and Perkins accordingly: To which Mountague chief Justice agreed, for he said, it was but an extract of ten out of twenty, the remainder continuing as before: And Reddus is Reventus, a turning again, but it is otherwise of a Condition, which is a new Creature, of which the wife shall take no advantage.

Crook Justice, This is a speciall reservation, and therfore the Executors shall have it, and not the wife, for she comes in Paramount, as in the case of Joynt-tenants: Haughton agreed therunto, and said, that the Rent shall be incident to him who hath the Reversion under the Lessor, who is the Executor: And Mountague demanded of Hobert chief Justice of the Common Pleas, his opinion in this case, who agreed that the wife shall not have it.

The same Term in the same Court.

Dennis *versus* Sir Arthur Mannaring, and others.

In the great case between Gabriel Dennis Plaintiff, in Trespasse against Sir Arthur Mannaring and Brimblecomb, and others, the Verdict was found for the Defendants: And now it was moved in Arrest of Judgment for the Plaintiff, because no Bail was entred for Brimblecomb one of the Defendants, for every Defendant is supposed in Custodia Marecalli, and in this case the Venire facias is awarded to try the Issue between the Plaintiff and Defendants, where one of the Defendants is no party in Court: And Serjeant More put the case of the Lord Chandoy and Sculler, and other Defendants, where the Judgment in such a case was resolved to be erroneous.

1 Mol. ab. 584.

A Verdict is given in B.R. before any bail entred, not good.

Mountague, we ought Discernere per legem quid sit justum, and here Brimblecomb being no party in Court, no Verdict could be given.

Doderidge, I have seen in this Court, where upon a Writ of Error brought in such a case, we have compelled him to put in his Bail, because he

should not take advantage of his own wrong and folly: But because that here no fraud appeared to be in the Plaintiff, he shall not be bound to stand to the Verdict: Haughton agreed, but Crook seemed to the contrary: But it was agreed, that if Brimblecomb had appeared at the Suit of any other, the same Term, it had been sufficient: And these Books were cited to be in the point, 32 H.6.2. 8 E.4.5. 21 H.6.10.

The same Term in the same Court.

Hide *versus* Whistler.

Exception of
all Wood,
under-wood,
Coppices and
Hedgerows.

A Coppice,
what it is.

William Hide made a Lease for years of certain Lands to Whistler, excepting to the Lessor all his Wood and under-wood, Coppices and Hedgerows; and in a Replevin the question was, whether the Soil shall passe ther by: for the Lessee put his Beasts into a Coppice, and the Lessor distrained them, whereupon, &c. And the words of the exception were further, standing, growing, and being in and upon the Premises: And the Lessee covenanted to make fences, but if the Lessor made new Coppices, that the Lessee should not make fences about them. And it was said, that a Coppice signifies a parcell of Land fenced for the safeguard of young Trees. And it was said for the Plaintiff, that Premises are Pre dimissa, and by these words, growing, and being in the Premises, it shall be intended that the Soil did not passe, for it is pre-demised: But it was resolved that the Soil it self was excepted by the exception of the Wood and Coppice, 14 H.8.1. The Bishop of London's case, Co.lib. 5. Ives case, and lib. 11. Lyfords case: And by the reserving of a Coppice the Soil it self is reserved; for by Mountague, that which is reserved is not demised, and so the Distresse well taken. Crook agreed, and he said the difference was good between Wood and Trees, for by the excepting of Wood, the Soil it self is excepted, otherwise of Trees: Haughton agreed that the Soil it self is excepted in this case, and so it was adjudged.

The same Term in the same Court.

Talbot *versus* Sir Walter Lacen.

Covenant to
leave the Pre-
mises in repa-
rations at the
end of the
Term.

In a Writ of Covenant brought by Margarer Talbot against Sir Walter Lacen, upon a Lease made by the Plaintiff to the Defendant, of a Park, &c. for five years, if he should live so long, in which the Lessee covenants for him, his Executors and Assigns, to keep the Premises in good Reparations, and so to leave them at the end of the Term, and also to deliver to the Plaintiff (upon notice given) four Bucks, and four Does in season, during the life of the Plaintiff, in every of the said years: And after the expiration of the aforesaid term of five years she brought a Writ of Covenant, and assigned the breach, because that in the end of the term he committed Waste, and because that after the end of the term the Defendant refused to deliver the Deer; And albeit the words of the delivery of the Deer are, during the life of the Plaintiff, yet they are also every of the aforesaid years, and therefore it was resolved that she shall not have them during her life in this case.

And

And for the other point it was objected, that in Fine termini, was uncertain, for it may extend after the term, but Ad finem termini had been sufficient, Old book of Entries, 169. for when he covenants that at the end of the term, he would leave the Premises in reparations, and Ad finem termini, he did waite, this ought of necessity to be intended a breach of the Covenant, and therefore it was adjudged that the action of Covenant well lies.

Mich 16. Jac. In the Kings Bench.

Havergall and Hares Case.

In this Case (which see before, fol. 1. b.) four points were observed.

1. Whether Fisher the Assignee of the Rent were such a person who shall take benefit of the entry? Before fol. 1. b

2. When 10 l. is only in arrear, whether the Rent of 20 l. shall be said in arrear?

3. Whether these advantages which were first granted with the Rent may be granted over?

4. When the Use shall rise, whether upon the first Indenture of the grant of the Rent, or afterwards? For the case was, that the Grantee of the Rent of 20 l. covenanted by the same Indenture, that if the said rent of 20 l. were in arrear for the space of twenty dates after any day of payment, that the Grantee shall distrain, and if there be not sufficient distresse upon the Land, or if there be a Rescous, Replevin, or Pound-breach, that then it shall be lawfull for the Grantee and his Heirs to enter into the same Land, and to retain it untill he be satisfied: And the said Rent was granted, 9 Jac. it was arrear, 11 Jac. the Fine for the better assurance of the Rent was levied 12 Jac. and 13 Jac. the Distresse was taken.

There were four Causes which give an entry, and upon the Distresse and Replevin brought the Assignee enters. As to the three first points, it was resolved by the whole Court,

1. That Fisher was such an Assignee who shall take benefit of the Entry.

2. When 10 l. is only arrear, the Rent of 20 l. shall be said arrear, where upon there shall be a Title of Entry.

3. That these advantages granted with the Rent may be granted over.

And as to the fourth point, it was holden by Mountague and Crook, that the Use riseth upon the first Indenture, and not upon the entry after the Replevin brought, although the words are, that then it shall be lawfull for the Grantee and his Heirs to enter, whereby the use is only awaked, as it is in the principall point in Shelleys case, and although a Fine is afterwards levied, yet the Use shall be directed by the originall Indenture, and therefore 6 Rich. 2. A Feoffment is made to two and their Heirs, and afterwards a Fine is levied upon it for further assurance, to the use of them and the Heirs of one of them, yet it shall go to the use of both, for it shall be respected according to the original agreement, where there are divers assurances for the perfecting of one and the same thing, 16 E. 3. tit. Age. A Daughter had a Seigniorie by descent, a Tenancy Escheats, a Son is born, he shall have the Land, see Sharoes case in 4 Mar. Dyer, and in Chadleighs case all looks to the originall agreement, and therefore variance of time shall not hinder the originall agreement, as 33. Ass. the Servant intends to kill his Master, and afterwards the Master puts him out of his Service, and then he kills him, this shall be petty Treason in the Servant, 28 H. 6. Two are bound in a Bond

Bond at severall times, and yet he shall declare against both, as upon the first delivery, 11 H. 7. it is adjudged, that if a Deed be delivered by an Infant, and afterwards it is again delivered when he comes of full age: And see Mallories case, Finches case, and Borastons case, Nunc & tunc & quando, are a demonstration of the time, and not of the matter, and so they concluded that the Use shall rise upon the first Indenture, and not upon the Fine or Replevin brought; but Doderidge and Haughton Justices contra.

Trin. 17. Jac. In the Kings Bench.

Silvesters case.

John Silvester promised to John B. that if he would marry his Daughter, that he would give with her a Childs part, and that at the time of his death he would give to her as much as to any of his Children, excepting his eldest Son, and afterwards he made his Executors and died: I. B. brought an action upon the case against the Executors upon this Promise, and shewed that the Executor had not given him a Childs part, and that such a younger Son of the Testators had a 100 l. given him: And it was resolved by the Court that the promise of a Childs part is altogether incertain, but being so much as any of his Children had, and then shewing that the younger Son had a 100 l. this was certain enough, and thereupon Judgment was given for the Plaintiff.

The same Term in the same Court.

Godfrey and Owen.

Words.
He is a very
Varlet, and
seeks to suppress
his brothers
will, &c.

Cornelius Godfrey was Plaintiff in an action upon the case for words against Owen Defendant, and the words were these, to wit, He is a very Varlet, and seeks to suppress his Brothers Will, he makes shew of Religion, but he is a very Hypocrite: And the words were spoken of a Merchant, to one who gave him much credite in his Trade.

Mountague chief Justice said, that the words which are actionable in such a case ought to touch the Plaintiff in his Profession, which these do not do, Et relata ad personam intelligi debent secundum conditionem personæ, for in the suppressing of his Brothers Will the case might be such that he might well do it, for perhaps there may be an after Will made; And so calling him Hypocrite lies not in the conscience of the Common Law, for God only can judge of the heart of man, and therefore these words do not touch the Plaintiff as he is a Merchant.

Doderidge Justice, Words ought to tend some way to the ruine of the party, or otherwise they are not actionable; and Judgment was given, Quod quere nil capiat per billam.

Mich. 17. Jac. In the Star Chamber.

Sir John Bingleys case.

In Sir John Bingleys case in the Star Chamber, it was resolved by the two chief Justices, Mountague and Hobart, and agreed by the Lord Verulam Lord Chancellor, and Sir Edward Coke, that if an Information be exhibited there which begins with divers particular misdemeanours, and conclude in the generall that, 1. The matter included in the generall charge ought to be Ejusdem generis. 2. They ought to exceed the particulars expressed in number. 3. They ought not to be greater or more capitall; whereupon Mountague cited the Statute which speaks of Deans and other Spiritual persons, upon which it hath been resolved that Bishops are not within it, for they are of a higher degree, and the principall reason of these rules was, because that a man cannot possibly make a defence, because he knows not what will be objected against him; and upon this Sir John Bingley was discharged at this time for the most transcendent Offence that was objected against him, to wit, concerning Captain Baugh, and other Pirates to whom the King of his grace and bounty had given 200 l. to make them Loyall Subjects: But Sir John Bingley, Colore officii, had defrauded them of almost all of it, for the want whereof some of them died miserably, and the rest became Pirates again. But Sir John Bingley made many protestations of his innocence in this matter.

An Officer of
his own
wrong.

And it was holden also that one might be an Officer of his own wrong, as their might be an Executor of his own wrong: And this was Sir John Bingleys case for something in the information, for he committed Extortion, Colore officii.

The same Term in the Star Chamber.

The Attorney generall put in an Information against divers Dutch Merchants, for buying and transporting of many great summs of Gold and Silver Bullion.

And it was said by the Court that divers Statutes had been made for redresse of this mischief, as the Statute of 5 R. 2. the Offenders whereof ought to forfeit all they may: and by another Statute in 17 E. 4. this Offence was made Felony to continue for seven years: But the Court would not now punish them upon any Statute, for it was an offence at common Law, and therefore punishable in this Court.

And Sir Edward Coke said, that if any be to be punished upon a penal Statute, it ought to be within two or three years at least after the offence committed, for the Informer hath but a year to sue, and the King two years for the most part.

The Statutes of 37 E. 3. and 5 E. 6. Prohibite the buying of Coin, and that it is so at the Common Law, see 21 E. 3. 60. and Plow. 215. and not only he that buys but he that sells also offends in it, for it is a Privilege only belonging to the King, and it is his Coin, and none can put a value upon it but himself, which is a flower of his Crown.

Hobart chief Justice of the Common Pleas, as one shall be punished for ingrossing any Commodity, a Fortiori, one shall be punished for ingrossing and buying of a great quantity of money, all other Commodities being thereby

To carry
Gold and Silver
out of the
Realm, punishable at
Common
Law.

ingrossed, for money is the Distresse of commerce: Pecunia est rerum omnium vendendarum mensura, Bracton 117. 18 E. 3. Hollinghead 109. 50 E. 3. Rot. Pat. Memb. 7. And for transportation, 17 E. 3. & 19 E. 3. Rot. Pat. 24. De monetis non transportandis, 19 R. 2. Rot. Pat. The Dutches of obtained licence to melt Coin to make Plate. And divers of the Defendants were within the Kings generall pardon, but in as much as they pleaded it in their Responder, and not in their answer (as it ought to be) the Court over-ruled their Plea, so that they could have no advantage thereby. But in as much as they were strangers, and not consant of our Laws, and relyed only upon their Counsell, the Court had consideration therof in their censure.

Hillary, 17 Jac. In the Kings Bench.

Serle *versus* Mander.

Words,
I arrest you
upon Felony.

Serle brought an action upon the case against Mander for these words, to wit, I arrest you upon Felony, and after Verdict for the Plaintiff, it was moved in Arrest of Judgment by Richardson that the words were not actionable, for he doth not say, that the Plaintiff had committed Felony; But it was resolved by the Court, and so adjudged that the action lieth.

The same Term in the same Court.

Judgment a-
gainst a De-
fendant when
beyond Sea
with an Am-
bassador re-
versed.

A Judgment was obtained against one of the Servants of the Lord Hay, Viscount Doncaster, when he was Ambassadors in Bohemia, and attending upon him there: And this matter being disclosed to the Court by the Counsell of the Defendant, they would not suffer the Plaintiff to have execution upon the said Judgment, but ordered the Plaintiff to declare De novo, to which the Defendant should presently answer.

Imparlanee.

Memorand. It was said to be against the course of the Court, to have an Imparlanee before the Declaration entred.

The same Term in the same Court.

The King *against* Briggs.

A Subject
cannot have
a Forest.

A Quo warranto was brought by the King against Briggs, for exercising of certain Priviledges, who justified by virtue of a Forest granted to him: And by Bridgeman, this is the first Quo warranto which he knew that had been brought against any Subject for a Forest, for a Subject cannot have a Forest, but he may have a Chase, which peradventure may passe under the name of a Forest. And there are divers incidents to a Forest which a Subject cannot use nor have; there ought to be a Justice of a Forest which a Subject cannot have, and such a Justice ought to be a man of great Dignity. 2. There ought to be Wardens who are Judges also, and by 34 E. 1. Ordinatio Forrester ought to be by Writ, but a Subject cannot award a Writ. Also there are three Courts incident to a Forest.

1. A Court of Attachments which may be without Wardens.
2. The Swanimate Court.

3. The

3. The Justice seat, and this appeareth in 1 E. 3. cap. 8. 21 E. 4. cap. 8: But by the Statute of 27 H. 8. cap. 7. There are some other incidents to a Forest. 2. Admits that a Subject may have a Forest, yet it fails in this case, because he hath shewn the exemplification and not the Letters Patents, and see Co. lib. 5. Pains case, that neither an exemplification, or constat, are pleadable at Common Law, and Co. lib. 10. Dr. Leyfeilds case.

The same Term in the same Court.

Sir William Webb versus Paternoster.

The case was this; Sir William Plummer licensed Sir William Webb to lay his Hay upon the Land of the said Sir William Plummer untill he could conveniently sell it, and then Sir William Plummer did make a Lease of the Land to Paternoster, who put in his Cattell and they eat up the Hay: And it was two years between the license and the putting in of the Cattell, and yet Sir William Webb brought an action of Trespasse against Paternoster for this.

Mountague chief Justice: 1. This is an Interest which chargeth the Land into whosoever hands it comes, and Webb shall have a reasonable and convenient time to sell his Hay. 2. The Lessee ought to give notice to Sir William Webb of the Lease before he ought to put in his Cattell; to which Houghton Justice agreed in both points: But Doderidge Justice said, that Sir William Webb had no certain time by this license, yet he conceived that he ought to have notice: But it was resolved that the Plaintiff had a convenient time (to wit, two years) for the removing of his Hay, and therefore Judgment was given against him. But admit that there had not been a convenient time, yet the Court was of opinion that the Plaintiff ought to have inclosed the Land at his perill, for the preservation of his Hay: And it was agreed that a license is countermandable, although it be concerning profit or pleasure, unless there be a certain time in the license, as if I license one to dig Clay in my Land, this is evocable, and may be countermanded although it be in point of profit, which is a stronger case then a license of pleasure, see 13 H. 7. The Dutches of Suffolks case for a license.

Notice.

Convenient time.

A license whether for profit or pleasure countermandable.

The same Term in the same Court.

Sibill Westerman brought an action upon the case against Everfall, and had Judgment: and in the entry of the Judgment she was named Isabell, 1 All. and 3. All. A fine was levied by Sibill, when her name was Isabell, and it was not good, for it both not appear to be the same party; so in the case at the Bar: And for this the Judgment was reversed.

Error. Sibill for Isabell.

The same Term in the same Court.

Jane as Executoz of brought an action upon the case against Chester, because the Defendant made request to the Testator of the Plaintiff to buy for him certain silk Stuffs for Apparell, and to make him a Cloak; the Defendant pleaded that he was within age, and George Crook said, that the Defendant should not be charged, because it is not shewn that the Apparell was for the Infant himself, but he was overruled in this, for it is sufficiently

An Infant chargeable for necessary Apparell.

ciently expressed to be for him. And it was agreed by the Court, that it ought to be shewn that it was *Pro necessario vestitu*, and it ought to be suitable to his calling, and (as Doderidge said) that there was a case adjudged in this Court between Stone & Withipole, that where Withipole had taken of Stone certain Stuffs for Apparel, being within age, and afterwards he promised payment if he would forbear him some time, and the Assumpsit adjudged not good, because he was not liable for the Debt at first for the reason aforesaid.

Trin. 17. Jac. In the Common Bench.

Gilbert de Hoptons Case.

Words.
Thou art a
Theef and hast
stolen my Furze.

An action upon the case was brought for these words, viz. Thou art a Theef and hast stolen my Furze: And after Verdict for the Plaintiff, it was moved in Arrest of Judgment, that these words were not actionable: But it was said on the other side, that to say, thou art a Theef, is actionable, and the subsequent words are in the Copulative, and enure as a confirmation of the precedent words: But if it had been for, Thou hast stolen my Furze, this had been an explanation of the precedent words, and therefore in that case the action would not have been: And it was answered and resolved by the Court that the word (and) in some cases shall be taken as the word (for) and so it shall be in this case, and therefore adjudged that the action lies.

Mich. 22. Jac. In the Star Chamber.

Fines in the
Star Chamber
for killing the
Kings Deer.

Two men came Ore tenus into the Star Chamber, for stealing of the Kings Deer, and were fined a 100 l. a peece, and three years Imprisonment, unlesse it would please the King to release them sooner, and before they should be released of their Imprisonment to be bound to their good behaviour: And it was observed by the Attorney-generall that the offence was the greater, in regard that the King had but one darling pleasure, and yet they would offend him in that: And it was said by some of the Court that it was a great folly and madnesse in the Defendants to hazard themselves in such a manner for a thing of so small value as a Deer was. The Lord President said, that Mr. Attorney was the best Keeper the King had of his Parks, in regard he brings the Offenders into this Court to be punished: The Lord Keeper said, that the Defendants in such a case being brought Ore tenus are not allowed to speak by their Counsell, and yet these men have had their Counsell, but it was Peters Counsellors, meaning, their secret and contrition at the Bar, which much moved him, so that if his vote might prevail he would set but 20 l. fine upon them.

In the same Term in the same Court.

The Lord Morley and Sir Richard Mollineux being beyond Sea, their Solicitors in their names exhibited a scandalous Bill in the Star Chamber against the Bishop of Chichester, and after their return this continued so for three years, without any disclaiming thereof by them, and now the mat-
ter

ter being questioned, they said, that it was not done with their privity: But because they had not disclaimed the fact before, they were fined a 100 l. to the King, and a 100 l. to the Bishop for Damages, and the Bill was to be taken of the file.

The same Term in the same Court.

Lewes Plaintiff *versus* Jeoffreys, and others Defendants.

The Plaintiffs Brother had been a Suitor to a woman, which matter proceeded to a Contract, and afterwards the Defendant Jeoffreys hapned to be a Suitor to her also, wherupon (being Rivals) they fell out, and the Plaintiffs Brother called the Defendant Jackanapes, which was taken very ill by the Defendant (being a Justice of Peace in the County of Worcester, and the other being but a mean man in respect of him) so that he told him that if he would meet him on Horse-back he would fight with him: afterwards one of the Sons of the Defendant went to the said Brother (being upon his own Land, and gave him a mortall wound, wherupon a friend on the behalf of the party wounded, came to the Defendant (being a Justice of Peace) and brought him a peece of his Skull, to the end that his Son should be forth coming at the next Assises, declaring to him the danger of death the man was in; wherupon the Defendant took a Recognisance of 10 l. of his Son and of his sureties of 5 l. a peece to answer this at the next Assise: And in the mean time the party died of the said wound, and the Son did not appear at the Assises, and the Judges of Assise fined the Defendant 100 l. for taking such slender security for the appearance of his Son, which was paid, and yet notwithstanding the Defendant was fined 200 l. more for this offence and also 200 l. for his misdoemeanor in his challenge, albeit the Defendant was of the age of 63 years, and so it seems that he intended to fight with him. But he being a Justice of Peace (who is Conservator pacis) he did against his oath to do any thing which may tend to the breach of the Peace.

A Challenge
 fined in the
 Star Cham-
 ber.

And for the other matter it was said by the Court, that the Defendant being father to the offender, it had been better for him to have referred this matter to another Justice of Peace, or at least to have had the assistance of another: And the party being in such great danger of death, his son was notailable.

Hillary 1. Car. In the Kings Bench.

Bowyer *versus* Rivet.

The case was thus; Sir William Bowyer 12. Jac. recovered against Sir Thomas Rivet in an Action of debt, Sir William made his wife his Executor and died, the wife made Bowyer her Executor and died; then Sir Thomas Rivet died, Bowyer brought a Scire facias to have execution upon the Judgment against Sir Thomas Rivet the younger, as Heir apparant to the Land to him descended from Sir Thomas Rivet, who pleaded Riens per descent from Sir Thomas Rivet, and it was found that he had two acres and a half of Land by descent; and it was prayed by Goldsmith, that Judgment might be given against Sir Thomas Rivet generally, for he said, that this false Plea shall charge him and his own Lands, and cited Plowden

440. where in debt against an Heir, upon his false Plea, his own Lands shall become liable to the debt, and Co. lib. 3. 11. b. Sir William Herberts case, where the case was upon a Scire facias against the Heir, as it is in this case.

But on the other part it was argued by Richardson the Kings Serjeant, Banks, and all the Justices, that Execution shall be awarded in no other manner against the Heir then it should be against his Ancestors, or other Purchasers, to wit, of a Property of that which he had by descent, for as much as in this case he cannot be to this purpose charged as Heir, but he ought to be charged as Tenant and as a Purchaser, and a Purchaser shall never hurt himself but his false Plea.

And Banks argued, that the Heir in this case is charged as a Purchaser, and the false Plea of a Purchaser shall never charge himself, 33 E. 3. Fitz. Execution, 162. and 6 E. 3. 15. and that in this case he is charged as Tenant appears by three reasons.

1. Debt will not lye against an Heir, but where he is bound as Heir, but in this case Execution is to be sued against him as another Tenant, Dyer 271. 11 E. 3. 15. and in 27 H. 6. Execution 135. and Co. lib. 3. 12. b. That in Judgment upon Debt or Recognizance the Heir is charged and Execution shall be sued against him as Tenant.

2. There is not any lien as Heir, for the Judgment doth not mention the Heir, and therefore he cannot be charged unless he be expressly bound, and in the Record of the Recovery, it doth not appear that the first lien shall bind the Heir, for he declares that he bound himself, and not that he bound himself and his Heirs.

3. If the Heir were bound in the Obligation so that he were once bound as Heir, yet the Judgment determines the specialty, so that now he is not bound, and in the Judgment the Heir is not mentioned, as in 10 H. 4. 21. 24. If an Abbot contract to the use of the house without consent of the Convent, this shall bind if he dies, but if he takes an Obligation of the Abbot and then he dies, this shall not bind the house, for the Contract is determined by the Obligation, and this is the reason that in the time of E. 3. in a recovery upon debt the Obligation was cancelled.

Where a debt
is recorded
upon bond
the Obligation
was cancelled.

4. Here he cannot be charged as Heir, for it appeareth by the Record that his Father is living, for it is brought against him as Heir apparant, which he cannot be but during the life of his Father.

And as to the objection, that in this case he shall have his age, and therefore shall be charged as Heir, Non sequitur, for if execution be sued against the Heir of a Purchaser, he shall have his age, and yet he is not Heir, neither can be charged as Heir to the Conusor: But because it is a rule in Law, that the Heir which hath by descent shall not answer where his Inheritance may be charged during his Minority.

Whiclock to the same intent, because the Heir is not charged here as Heir but as Tenant, whereby his false Plea shall not hurt him, with which Jones also agreed, and said, that he here considered three things.

1. That the lien of the Ancestors binds the Heir.

2. How the Heir shall behave himself in pleading.

3. Our point in question. For the first there are two things requisite to bind one as Heir. 1. A lien expresse, for if one bind himself and not his Heir, this shall not bind his Heir in any case. 2. A descent of Inheritance, for without this he shall not be bound by the act of his Ancestors, and he is bound no longer then Assets descend, for he alien before the Will purchased the lien is gone. 2. He ought to behave himself truly and plead truly, and confesse the assets descended to him, when debt is brought against him as heir, otherwise his own Lands shall be charged with the debt, as it is in Pepys case in Plow. Com. But where it is said in Pepys case; that upon a Nihil dicit,

or Non sum informatum, &c. If the Judgment passe upon them, that it shall be generall; I am not of that opinion, for the common experience of the Courts is, that such a generall Judgment shall not be given against the Heir; unless it be upon a false plea pleaded, with which agrees Lawsons case, Dyer 81. and Henninghams case, Dyer 344. where the Judgment passed by Nihil dicat, so that the saying in Plow. 440. a. that what way soever the Heir be condemned in debt, if he do not confesse the Assets, &c. that it shall be his proper debt, is not now taken for Law.

And I also hold, that if the Heir plead falsly, and there is found more Assets, that yet it is in the election of the Plaintiff to charge him and to take execution of the Assets only, or to take an Elegit of all his Land, and he is not bound to take an Elegit of all his Land in this case, for otherwise this inconvenience may arise: If the Heir hath a 100. acres by descent, and two by purchase, if upon the false Plea of the Heir the Plaintiff cannot have any other execution but an Elegit of the Poverty of his Lands, then he by this is prejudiced, for otherwise he might have all the Assets in execution, and so the Heir by this way shall take advantage of his false plea. 3. He held as Whiclock before, and for the same reason Doderidge Justice: How the Heir shall be bound by the act of his Father, is worthy of consideration, upon which Prima facie the Books seem to disagree, but being well considered, accord with excellent harmony. I have considered this case, it was moved at Reading Term, and because my Notes are not here, I will speak more briefly, and will consider,

Where upon a false plea by an Heir, the Plaintiff may elect to take the Assets in execution or an Elegit of all his Land.

1. How an Heir shall be charged upon the Obligation of his Father: and as to that in debt against an Heir, he is charged as Heir, so that at this day it is taken as his proper debt, whereby the Writ is in the Debet and Detinet, but in the Detinet only against Executors: But in former time from the 18. of Ed. 2. till 7 H. 4. if an Executor had Assets, the Heir was not chargable, but in 7 H. 4. the Law changed in this point, for now it is accounted his own debt, and debt will lye against his Executor, as it is said in Plow: Com: and so against the Heirs of the Heir to many generations, albeit of this Plowden makes a doubt, and his plea that he had nothing at the day of the Writ purchased, nor ever after, is good, for if he alien the Assets he is discharged of the debt, in regard he is not to wait the action of the Obligee.

How an Heir shall be charged upon the Obligation of his Father.

2. The Heir shall be charged upon or Recognisance, not as Heir, but as Ter-tenant, for he is not bound in the Recognisance, but only the Conusor grant that the debt shall be levied of all his Lands and Tenements, but not against his Heirs. And here he is not merely as Ter-tenant, for he shall not have contribution against other Ter-tenants, but only against those who are Heirs as himself is, but to all other intents he is Ter-tenant, and so charged, as 32 E. 3. and 27 H. 6. are.

Why an Heir is not chargable for debt, after he hath sold the assets.

3. That upon a Judgment (as our case is) the Heir shall be charged as Ter-tenant and not otherwise: The Book which hath been cited, viz. 33 E. 3. Execution 162. is expresse in the point; the broken years of Fitzherbert are obscurely reported, but by comparing of cases it will appear to be our case expressly.

4. That albeit an Heir shall be charged upon the Obligation of his Ancestor, where he is particularly bound, yet upon his false plea no execution shall be but upon the assets: So it seems to me that in the principall case the Judgment shall be speciall, and it seems to be a very plain case.

Crew chief Justice agreed, and in his argument he affirmed what Jones said, that a generall Judgment shall not be given against the Heir, if he do not plead falsly that he hath no Assets, and not upon Nihil dicat: And so Judgment was given that the Plaintiff shall have Execution of the Poverty of the Lands descended to the Defendant; and so note the diversity of debt against the Heir, and Scire facias against the Heir.

Dickenson

Dickenson *versus* Greenhow, Hill. 1. Car. In the Kings Bench,
Intr. Hill. 18. Jac. Rot. 189.

In an Attachment upon a Prohibition, the Plaintiff declared that where Robert the last Abbot of Cokerham in Lancashire, was seised in Fee of three acres of Land, parcel of his Monastery, and that the Abbot and his Con-monks, and all the Predecessors of the Abbot were time out of mind of the order and rule of Præmonstratenses, and that the order of Præmonstratenses, and all Monks thereof, were time out of mind discharged of payment of tithes for their Lands and Tenements, Quamdiu manibus propriis aut sumptibus excolebant. And that the said Abbot and all his Predecessors time out of mind had holden the said three acres discharged of payment of Tithes, Quamdiu, &c. and so held them untill the dissolution of the Monastery, and shew the surrender to H.8. and the Statute of 31 H.8 by force whereof H.8. was seised and held them discharged, and from him derive them to E.6. and from E.6. to Queen Mary, and from her to Queen Elizabeth, and from her in the 42. year of her Reign to Wagstaff, and from him by mean conveyances to Dickenson the Plaintiff, Quorum pretextu he was seised, and enjoyed them in Propria manurantia, and shew the Statute of 2 E. 6. cap. 15. whereby it is enacted that Tithes shall be paid as usually they were, &c. Quorum pretextu, the Plaintiff held the three acres discharged of Tithes, and that notwithstanding; and against the Prohibition, the Defendant did draw him into Plea for them in Court Christian, and the Judge thereof held plea, and the Defendant did there prosecute, him to the disinherison of the Crown: And upon this the Defendant demurred, and prayed a consultation. And Sir John Davies the Kings Serjeant argued for the Defendant, that a Consultation should be granted, because that his matter of discharge is double.

1. His Priviledge. 2. The prescription, and if either of them will not help him, then he ought to be charged: For the Priviledge, he took it that the Præmonstratenses never had such a priviledge. It is a Maxime in Law, that all persons ought to pay Tithes, and all Lands shall be charged with them of common right; but also there are divers discharges of them and allowed by our Law (as is manifest by the orders of Templers, Hospitalers, and Cisterciens, which discharges our Law allows) and these are, 1. By prescription. 2. By real composition. 3. By priviledge obtained, and that by two ways.

1. Either by the Bull of the Pope, for he taking upon himself to be the great Dispenser and Steward of the Church, took upon him to discharge them, but this (as it is holden by the Canon) he could not absolutely do, but might direct them to a Clergy man, or grant to another to hold them by way of retainer, and this ought to be to a Clergy man also. Or,

2. By a generall Counsell, for some orders were discharged by generall Counsels: So some obtained Priviledges by the Popes Bulls, which are his Patents, some by Counsels which are as his Statutes, and Decrees were as Judgments, but yet none of them had ever any force in our Law, nor did bind us in England more then voluntarily retained and approved by usage and custom, for as it is said in 11 H. 4. the Pope cannot alter the Law of England, and this is evident, for in all cases where the Bulls or Constitutions of the Pope crosse the Law of the Land, they have alwaies been rejected; as for instance,

1. In the Bulls which are of four sorts.

1. Of Prohibition.

2. Of Citation.

3. Of

All Lands
chargable
with Tithes.

The Popes
Bulls of four
sorts.

3. Of Exemption. And 4. Of Excommunication. And as for those of Excommunication, it appeareth that it was Treason at Common Law, and that the Treasurer did kneel to E. 2. for one who brought them in, and in the perpetuall course of the Books afterwards, they have alwaies been disallowed in Pleas. So his Bulls of Citation, before the Statute of Provisiō was a heinous offence, and so are Bulls of Provisiō and Exemption. For his Canons, where they were against the Law they were neglected. It appeareth by the Canon, *Quod nullus capiat beneficium a Laico*, and yet notwithstanding continued long after for Benefices, and does yet for Bishopricks, that the Clergy shall take them from the King and a lay-hand: And also there is a Canon for exemption of Clerks out of temporall Jurisdiction: but yet as Brian saith, 10 H. 7. 18. it was never observed here. So the Canon saith, that the time of the Laps shall be accounted *Per septimanas*, but our Law not regarding this, saith, that it shall be accounted *Per menses* in the Calender, as it is expressly adjudged in 5 E. 3. Rot. 100. Rot. claus in turri: And there is a great reason for it, as it is in 29 H. 3. memb. 5. in turri. It is not necessary for Bishops of England to go to generall Councils; so as in Parliament those that do not send Knights or Burgesses shall not be bound by Statutes. And the Counsels of Lyons, of Bigamis, &c. are expounded by Statutes how they shall be taken; so that if they have a Priviledge (as in truth they have) by the Popes Bulls, if it were not allowed in England, they are not of force to privilege them against the Common Law of the Land for payment of Tithes; but this was never here allowed.

And now for the Prescription this cannot help them, for Monks are not of Evangelicall Priesthood, to wit capable of Tithes in the Pernamy, but meerly Lay-men, and then as the Bishop of Winchesters case is, they cannot prescribe in *non decimando*; And Bede saith of them, that they are *Merè laici*, so that if their Priviledge were allowed, their Prescription will not help them. The privilege of Præmonstratenses was by the Counsell generall of

for their discharge, which denies that all religious persons should be discharged of Tithes of Lands in their own hands, *Quamdiu*, &c. But afterwards Adrian restrained it to Templars, Hospitalars, and Cisterciens, omitting the Præmonstratenses; and the decree of Adrian was received also, whereby the Law took notice of the discharge of the said three Orders. True it is, that the Præmonstratenses have a Bull of Pope Innocent the third, of discharge, and as large liberties as the Cisterciens, but they never put this in ure: And it seems, 1. That there were of them 29 Abbots & Abbys, and yet their privilege is not mentioned in all the Books as the Cisterciens is. 2. They complained to Gregory the ninth, that they were not suffered to put it in ure, and notwithstanding this complaint and command of the Pope to the Clergy to allow them this privilege, yet 24 H. 3. Complaint was made against them in Parliament for claiming this privilege: But the Statute of 2 H. 4. cap. 4. put this out of doubt, for this put the Cisterciens in a premunire, for purchasing and putting in execution Bulls of exemption of their Lands purchased afterwards.

Now if the Præmonstratenses had the same privilege they should not have been omitted out of this Statute; then comes the Statute of 7 H. 4. cap. 6. which terrifies all from putting in execution Bulls of Exemption of their Lands not put in execution before, upon which it is not to be presumed that it was put in execution afterwards.

But admit that the Præmonstratenses had this privilege: I say, that the Plaintiff hath not applied this privilege to himself, for he hath not averred in fact that at the time, &c. *Propriis manibus excolebat, nec ad firman demittebat*; And this he ought to have done if he would take advantage of the privilege

privilege, as in Dickenson's case, Novel lib. intr. 542. there it is expressly alleged in the like case, as ours is here, and where the same privilege as here is claimed, *Quod manibus propriis excolebat*.

True it is that it is said here, that after the Feoffment to him made, he was seised *Et gavisus fuit in propria manutentione*, but he doth not say, that at the time of the Tithes due, *gavisus fuit*, &c. as he ought expressly to have done, as appeareth by other cases.

If one prescribe to have common in arable Land when the Corn is reaped, or in Meadow where the Hay is carried away, and justify by reason thereof he ought to aver that the Corn or Hay was carried away when he put in his Cattell, otherwise he hath not applied the prescription to himself.

So if one justify for Common *Quandocunque audia sua jerint*, he ought to aver that his Cattell then went in the place where, &c. as 17 Aff. 7. So if the King pardon all but those who adhere to M. he who pleads it ought to aver that he did not adhere to M. so here the privilege is *Quamdiu propriis manibus*, &c. and therefore at the time he ought to aver that he had it *propriis manibus*, &c.

Also where upon the surrender to H. 8. and the Statute, they conclude that the Queen held it discharged, this cannot be, for this ought to be in such manner as the Abbot held it discharged, but this was *quamdiu*, &c. and the King cannot be bound to such an unbecoming condition, and therefore he shall hold it discharged: Like to the case where the Abbey hath the presentation, and another the nomination, the Abbey surrenders, he who hath the nomination shall have all, for the King shall not present for him, it being a thing undecent for his Majesty, and so he concluded for the Defendant.

Banks contra. 1. That it is a good cause of Prohibition. 2. That it is well applied to us.

1. That the order of Premonstratenses is discharged of Tithes, that they had once this privilege, hath been allowed by the other party, by the Bulls of the Pope, and that it was allowed and taken notice of, he proved by this that this Bull was confirmed by King John in the 24. year of his Reign, the Charter whereof he said he had under Seal, and 22 E. 1. membran. 5. there were 26. Abbies of this order, and the King took them all into his protection with their Immunities, and 22 Rich. 2. John de Gant having Jura Regalia in Lancashire (where the Abbey is) confirmed to them this Bull, and also this hath been divers times allowed and decreed to them in Court Christian for suit of Tithes, as in the case of the Abbey of Bigham which was of the same order.

And as to that which was objected, that if the Premonstratenses had such a privilege as the Cistercians in 2 H. 4. that the like provision would have been against them.

As to this I answer, that such a provision is not against the Templars nor Hospitalars, and yet they have such a privilege.

2. It may be that they never enlarged their privileged above their grant. And for the Statute of 7 H. 4. our privilege was not then new, and it was afterwards allowed in 22 R. 2. And also I conceive, that if the Abbey were discharged at the time of the dissolution, although not *De jure*, yet this is a sufficient discharge within the Statute of 31 H. 8. as it is taken Co. lib. 11. 14.

2. I hold that they may here prescribe to be discharged of Tithes, because they are Spiritual persons, and capable of cure of Souls, and capable of tithes in Pernamy, as if an Appropriation be made to them.

3. It is not now to be argued, whether they have such a privilege, for they have denurred, which is a confession of all matters in fact, &c.

4. If there be a matter wherupon the Prohibition may be grounded it will serbe, vide Dyer 170, 171. Co. lib. 11. 10.

And 5. The priuiledge is well applied, because it is shewn that they were once discharged.

6. He needs not to shew how he is discharged, 22 E. 4. 4. 5 E. 4. 8. 20 E. 4. 15. Also the discharges are temps dont, &c. and therfore not pleadable; so he prayed that the Prohibition might stand.

Pasch. 1. Car. In the Kings Bench.

Bowry *versus* Wallington.

NOte that in this case upon the Statute of 50 E. 3. 4. it was agreed by the Court, that if there be a Suit in the Ecclesiasticall Court, and a Prohibition awarded, and afterwards Consultation granted, that upon the same Libell no Prohibition shall be granted again, but if there be an Appeal in this case then a Prohibition may be granted, but with these differences.

1. If he who appeals pray the Prohibition, there he shall not have it; for then Suits shall be deferred in infinitum, in the Ecclesiasticall Courts.

2. If the Prohibition and Consultation were upon the body of the matter and the substance of it, for otherwise he shall be put many times to try the same matter, which is full of veration. And the case was moved again, and argued by Noy, which was thus.

Wallington libelled in the Ecclesiasticall Court against Bowry for tithes of Wool and Lamb, and Bowry upon suggestion of a Modus derimandi obtained a Prohibition, and had an Attachment, and declared upon it, and are at Issue upon the Modus, which is found for the Defendant, and Consultation granted, wherupon Judgment was given in the Ecclesiasticall Court against Bowry, upon which Bowry appealed, and prayed a new Prohibition, and had it, and Noy moved for a Consultation. 1. Because that a Prohibition and an Attachment upon it are but one Suit, for the contempt of the party in bringing his Suit in another Court, and translating this from the Kings Court, and when it is once tried for the Defendant, the same thing shall not be tried again. And as to the Statute of 50 E. 3. 4. upon the mistake wherof the mistake is raised, he confessed that the Printed Books, and also in the Extract of the Parliament, one Roll remaining in the Tower is (the same Judge) but the Parliament Roll it self, and the Petition is, *Licet atque Iudici Ecclesiastico sine diocesi eidem an huiusmodi*, and the answer to the Petition is, one Consultation granted sufficeth in this case: And the Parliament Roll it self was brought into the Court and viewed, but he said, that if it were as it is in the printed Book and Extract, the same Judge shall not be intended the same personall Judge, but the same Judge of Consuance of the same Jurisdiction or cause, for otherwise, if another Commissary be made, as the Bishop may when he will, his Successor may be newly prohibited, and also one thing may be infinitely tried, for in many places the Suit begins in the Archdeacons Court, and from him an Appeal may be brought to the Bishop.

Where several Prohibitions may be granted in the same case, and where not,

The same Term in the Kings Bench.

Pack *versus* Methold in a Writ of Error.

In Mich. Term, 22 Jac. Methold brought an action upon the case in the Common Pleas against Pack, and declared that in consideration that the Plaintiff would pay to Playford 52 l. 14 s. to the use of the said Pack, such a day, &c. Pack promised to deliver to him his Bond (in which he was bound to him in the said sum) when he should be therunto requested: And shews that he had paid, &c. and the Defendant did not deliver to him the Bond, albeit the same to do he was afterwards often times requested, and upon non assumpsit pleaded, it was found for the Plaintiff, and now it was moved in Arrest of Judgment, because the request is not laid specially, nor the day nor place thereof expressed. But the Court, to wit, Hobart chief Justice, Hutton and Harvey gave Judgment for the Plaintiff, and yet they agreed, that if he had demurred upon the Declaration, it had not been good, and also that if it had been generall, Licet sapius requisit, it had not been good, in as much as it is parcell of the promise, and therefore ought to be laid substantially; viz. That it was after the promise and payment of the 52 l. but the time is supplied by these words Postea, and there is no defect but in the place, and (Postea) implies that it was after the promise and payment.

And Hobart said, that all the points of the Declaration which have matter and substance are good, only there wants the place where the request was made, which by the Issue is moved, and the request is here well notified to the Court, and the defect of the place is now helped by the Statute.

Hutton said, that if the promise had been to pay so much upon request at Easter, there the day ought to have been shewn, and (Postea) had not been sufficient, but here the Postea refers only to a thing whereby it is certain; and he said, that upon this Issue such a request shall be given in evidence.

Harvey said, that the request being here laid as it is, the Court may well give Judgment: And it seemed to Hobart that such a request cannot be given in evidence where the Issue is upon an Assumpsit: And Judgment was given for the Plaintiff; and afterwards a Writ of Error, Hill. 1. Car. was brought in the Kings Bench, and the opinion of the Court was strongly, that the Plaintiff ought to have alledged the request specially and certainly in time and place, because it is traversable and parcell of the Assumpsit, and not to be done but upon request.

Jones Justice remembered divers Presidents in the point, and further day was given to bring in Presidents of either side, and two Presidents were produced according to the opinion of this Court, Scil. Pasch. 30 Eliz. Rot. 464. in 1. Court, Old and Estgreens case, Trin. 16 Jac. Rot. 268. Wales case.

But in Debt Licet sapius requisit is sufficient, for it is not material nor traversable, for the bringing of the action of Debt (which is a Precipe) is a sufficient demand in it self, and afterwards at another day the Court continued of the same opinion, and therefore the Plaintiff in the first action brought a new action, Quod nota, for albeit the Defendant had pleaded non assumpsit, and Issue was joyned upon it, yet this did not amend the evil laying of the request, according to the Presidents abovesaid.

Where in an action upon the case, there ought to be a special request, and where not.

Pasch. 2 Car. In the Kings Bench, int. Hill. 1 Car. Rot. 135.

Constable *versus* Clobery.

In an action of Covenant, the question was upon the Traverse; the Plaintiff declared upon the Indenture of Covenant, and the Covenant was that a Ship shall go with the next fair wind, and that the Merchant shall pay so much for freight: the Defendant saith by way of traverse, that he did not go with the next wind, and it was objected by Stone of the Temple, of Counsel with the Plaintiff, that the Traverse was not good, but he ought to have traversed that the Ship did not go at all, for that which is materiall shall be traversed, and that the Ship did not go is the most materiall thing here, and this appeareth by 15 E. 4. 2. where a Gift in tail is traversed, and not the death of the Tenant in tail, 19 H. 8. 7. 36 H. 6. 16. 2 H. 5. 2. 2 H. 7. 12. and there are cases to this purpose, Co. lib. 7. 9. Ughtreds case: If a man intitles himself to Land by an Estate which cometh by Condition, he ought to shew that the Condition is performed: A Covenant against a Covenant will not make an Estoppel, but he shall bring his action, 3 H. 6. 33. Where he ought to shew that he went to Rome, because it is a precedent Condition: The principall case in Ughtreds case prove other, to wit, that which is materiall is alledgable: And the difference upon the case of 48 E. 3. 3. 4. Where A. Covenant with B. to serve him with three Esquires in France, and B. covenant for it to pay him 42. marks, he may chuse to covenant in generall or speciall, as he will, for there was Covenant against Covenant, and here there is a Covenant of one part to go with the Ship, and on the other part to pay so much for the freight, and so Covenant against Covenant.

And it seemed to Doderidge Justice, that the Traverse is not good, for the Traverse here is by permission of God.

And for another thing where Merchants covenant to pay jointly and severally, according to the quantity of the Wares, there an action of Covenant may be brought against one alone, for the Deed is severall.

And by Crew chief Justice, it cannot be a good Traverse, for a circumstance cannot be traversed, for wind is alterable, and a thing materiall is only traversable, and here the Covenant is severall for their severall freights, and it may be that others have paid him.

Jones Justice, the traverse is not good; and for the other matter he cited Mattheusens case, Co. lib. 5. 22. Where upon a Charter party if one seal be broken all is gone. If three are bound jointly, and an action is brought against one, and it appeareth that others have sealed, the writ shall abate: But in this case an action lies against him alone, although the other be named in the Indenture.

The same Term in the same Court, intr. Hill. 22. Jac. Rot. 1019.

Millen *versus* Fandrye.

An action of trespassse was brought for chasing of Sheep, the Defendant pleaded that they were trespassing upon certain land, and he with a little Dog chased them out, and as soon as the Sheep were out of the land he called in his Dog, and upon this the Plaintiff demurred; The point singly was but thus; I chase the Sheep of another out of my ground, and the Dog pursues them into another mans land next adjoyning, and I chide my Dog,

Justification
in trespassse.

Et

and

and the Owner of the Sheep brings trespass for chasing of them: And it was argued by Whistler of Grays-Inne, that the justification was not good, and he cited Co. lib. 4. 38. b. that a man may hunt Cattell out of his ground with a Dog, but cannot exceed his authority, and by him an authority in Law which is abused is void in all, and to hunt them into the next ground is not justifiable. The Books differ, if Cattell stray out of the high way involuntarily, whether Trespass lies, 7 H. 7. 2. and H. 7. 20. but all agree, that they ought to be chased out as hastily as may be.

Littleton argued for the Defendant, that Cattell may be chased out into another mans ground, and he said that a man cannot have such a power upon his Dog as to recall him when he pleaseth, and a Dog is ignorant of the bounds of Land, and he resembled this case to other cases of the Law; first to 21 E. 4. 64. In Trespass of Cattell taken in A. in D. the Defendant saith, that he was seised of four acres called C. in D. and found the Cattell there Damage feasant, and chased them towards the Pound, and they escaped from him and went into A. and he presently retook them, which is the same Trespass, and admitted for a good plea: and 22 E. 4. 8. In trespass the Defendant justifies by reason of a custom that they which plow may turn their Plow upon the Land of another, and that for necessity, and it was allowed for a good justification, and he hath more government of his Dren, then in our case he can have of his Dog.

If a man be making of a lawfull Chase, and cannot do it without Damage to another, this is Damnum absque injuria, 21 H. 7. 28. And he cited a case which was in Mich. 18 Jac. between Jennings and Maystore, where a man of necessity chased Sheep for taking one of his own, in trespass he may justify it: And also if a Dog goes into the Land of another (as in this case) trespass does not lye, but otherwise it is of Cattell.

Crew chief Justice, it seems to me that he might drive the Sheep out with the Dog, and he could not withhold his Dog when he would in an instant, and therefore it is not like to the case of 38 E. 3. Where trespass was brought for entering into a Warren, and there it was pleaded that there was a Pheasant in his Land, and his Hawk flew and followed it into the Plaintiffs ground, and there it seems that it is not a good justification, for he may pursue the Hawk, but cannot take the Pheasant, 6 E. 4. a man cuts Thorns, and they fell into another mans Land, and in trespass he justified for it; and the opinion was, that notwithstanding this justification trespass lies, because he did not plead that he did his best endeavour to hinder their falling there, yet this was a hard case; But this case is not like to these cases, for here it was lawfull to chase them out of his own Land, and he did his best endeavour to recall the Dog, and therefore trespass does not lye.

Doderidge Justice agreed, for here was no hedge, and when he saw them out of his own ground, he rated the Dog, 12 H. 8. this difference is taken, if I see Sheep in my Land, I may chase them out, but if another sees them and chase them out, I may have trespass against him, because he hath taken away my advantage; and the nature of a Dog is such that he cannot be ruled suddenly, and here it appeareth to be an involuntary Trespass, 8 E. 4.

For an involuntary trespass action doth not lye.

A man is driving Goods through a Town, and one of them goes into another mans house, and he follows him, trespass doth not lye for this, because it was involuntary, and a trespass ought to be done voluntarily, and so it is Injuria, and a hurt to another, and so it is Damnum.

If Deer be out of a Forest, the Owner of the Land where they are may hunt them, and if the Deer flye to the Forest, and the Hounds pursue him, then he ought to call in the Dogs, and so I may justify, and trespass lies not.

In the time of chief Justice Popham, this case was adjudged in this Court.
Trespass

Trespasse was brought for hunting and breaking of hedges, and the case was, that a man started a Fox in his own land, and his Hounds pursued him into another mans Lands, and it was holden that he may hunt and pursue him into any mans land, because a Fox is a noysom creature to the Common-wealth.

Bracton saith, that when a man is outlawed he hath Caput lupinum, and he may be hunted through all the County: And he agreed the case of 8 E. 4. If a Tree grow in a hedge, and the Fruit fall into another mans land, the Owner may fetch it in the other mans land, and he also agreed the case of 22 E. 4. 8. of the Plow, and so concluded that the trespasse doth not lye.

Jones Justice, that the trespasse doth not lye, vide Co. lib. 8. 67. Crogates case, and lib. 4. Terringhams case, and he cannot recall his Dog in an instant: And the same day Judgment was given for the Defendant, Quod quærens nil capiat per billam.

The same Term in the same Court.

Marsh *versus* Newman.

In a Replevin the Defendant pleaded that was seised In
jure Collegii, and doth not say, that he was in Dominico suo ut de feodo, and the Plaintiff demurred upon the Abowry. And Andrews argued for the Plaintiff.

1. The Defendant ought to have alledged certainly that they were seised in Fee; for Littleton saith, that in Counts and pleadings a man ought to shew how he is seised, 8 E. 3. 55. 13 Eliz. Dyer. 299. Pl. 31. An Inquisition was found upon an extent of a Statute-merchant, and doth not shew how the Consoz was seised, but only that he was seised, and the Inquisition holden void. But it may be objected, that if Land be given to a Dean and Chapter that they have fee, 11 H. 7. 12. I confesse it: But the constant use of pleading hath alwaies been in case of a Bishop, Colledge, &c. to say, that they were seised in Fee, as appears in Hill and Granges case, and Co. lib. 6. the Dean and Chapter of Worcesters case, and Co. lib. 11. 66. Magdalen Colledge case; and it appeareth by 20 H. 7. in the Abbey of S. Austins case, that an Abbey may have a Lease Prae auter vie, and so perhaps here the Dean had a Lease but Prae auter vie, and therfore ought to have alledged that he was seised in Fee, if the truth were so. And he moved other exceptions, as 1. That the Defendant intituled himself to a Lease as Executoz, and doth not plead Literas testamentarias.

2. That the Defendant entitles himself to a Kent, part of which was due in the time of the Testatoz, and part in his own time, and doth not shew when the Testatoz died, and therfore the Abowry not good.

Jermy for the Defendant that the Abowry is good, and it cannot be otherwise intended but that they are seised in Fee, 11 H. 7. Lands given to a Parson and Comminalty is Fee-simple, but otherwise of an Abbot and Parson, Plow. 103. and Dyer 103. A Seisin in Fee is implied by Seisin In jure Collegii; and because it hath been objected that he may be seised Prae auter vie, this is but a forraign intendment, for a Fee is alwaies intended Seisin in Fee-simple.

For the second objection, because Non profert literas testament, true it is if he entitle himself meerly as Executoz, he ought to bring in Literas testamentar. but our case is not so, for here we are Defendants, and we endeavour only

only to excuse a *Writ*, 36 H.6.36. Where a man is Plaintiff he ought to shew *Literas testamentar.* that so the Court may see that he hath cause of action, but here it is only by way of excuse.

For the third, that the death of the Testator doth not appear is not material, for if any part be due to him, it is due as Executor.

Doderidge, they ought to have pleaded that they were seised in Fee; true it is, that Land given to a Husband and Community is Fee-simple, and the reason is because they are perpetually, and if the Estate be not limited they shall take according to their continuance, 11 H.4.11 H.7. and 27 H.8 Doderiges case, they may be seised *Præ terme dauteur vie*, but if they had pleaded that they were seised to them and their Successors, this pleading is good, *Prima facie*, 17 E.3.1.

Crew chief Justice, all the authorities are that they were seised in Fee, *In jure Collegii*, and it is good to admit a new way of pleading.

Jones Justice, Tenant *Præ auter vie* makes a Lease for years, and *cestui que use*, dies, he cannot have an action of Debt against Lessee for years, for he is now Tenant at sufferance. But for the first point, it seems to him that the pleading is not good, for although in point of Creation, they take a Fee by a Gift to Dean and Chapter, yet in pleading they ought to alledge their Estate specially, for they may have an Estate *Præ auter vie*: And this is in an Abolition which shall be taken strictly. And by Crew chief Justice, the Defendant here ought to shew *Literas testamentar.* for he is an especial Attorney in the Abolition. And by Doderidge, *Longissimum vitæ tempus est* 100. years, Co.lib.10 50. Lampets case, and therefore in pleading, if the Defendant had said, that a Dean and Chapter were seised, and made a Lease for 200. years, this implies a Seisin in Fee, because a man cannot have so long a life, but here the Lease is but for 89. years, and it is common to let for 89. years, if A. shall so long live, yet this is but a Slip, and the Title is apparant.

The same Term in the same Court.

Hodges *versus* Moore.

In Debt for marriage money, the case was this: A man was bound to Hodges to pay him a 1000 l. after that he had married his Daughter, and afterwards he married her, and brought Debt upon this Obligation, and it was not averred that he had given notice to him of the marriage, but demanded the money: And this was moved by Noy in Arrest of Judgment (but quare if request afterwards doth not imply notice.)

Where notice
is requisite
before action,
and where
not.

And Doderidge Justice put this case, A man is bound to pay a 100 l. two moneths after A. return from Rome, he ought to give notice of his return before that he can have an action upon this Obligation, for he may land at Newcastle, or Plymouth, where by common intendment the Obligor cannot know whether he be returned, or not; and this was agreed by the chief Justice and Jones.

And Serjeant Davies argued for the Plaintiff, that there need not precise notice to be given, and he cited 1 H. 7. 18 E. 4. and Co. lib. 8. Where the Obligor shall take notice at his perill, and so here because he takes upon him for to pay it: And it was said, that one Blackamores case was adjudged in the point, and he conceived also that this request afterwards is a sufficient notice. But Noy for the Defendant said, that he ought to give notice, or otherwise this mischief would ensue, that if he had not married her, and yet had demanded

demanded the money he ought to pay it: and he said, that where an act is to be done by a stranger, the Plaintiff or Defendant ought to take notice thereof at his perill, as the case C. 4. where a man was bound to stand to the Award of J. C. he ought to take notice of the Award at his perill: but where it lies properly in the Conscience and notice of the Plaintiff, there he ought to give notice thereof to the Defendant, Co. lib. 5. Mallories case: If a Reversion be bargained and sold to J. S. the Bargainee shall have the Rent without Attornment; but if a penalty be to be forfeited, he ought to give notice to the particular Tenant of the Grant, or otherwise he shall not take advantage thereof: and he cited a case which was in 17 Eliz. Stephen Gurneys case; Lessee for years, the Reversion is granted over for years by way of future Interest, to begin upon the death, forfeiture, or determination of the first Lease; provided that if the Rent upon the second Lease be arrear, that the Lessor may enter; the first Lessee surrenders, a Rent-day inour, the second Lessee doth not pay the Rent, the Lessor shall not enter for a forfeiture, because the first Lease determined by an act which lies properly in the Conscience of the Lessor, and because he was to take advantage by it, he ought to have given notice thereof to the Lessee, and here he might have well given notice to the Defendant, for it lies properly in the Conscience of the Plaintiff.

The second Objection was, that here was an implied notice, because the Marriage was at the instance of the Defendant, which implies a notice.

Under favour, this is no notice, for this is before the marriage, but if no notice be given after the marriage, then there is no notice.

But by Serjeant Davies, there is a sufficient implication, and there is no need of notice in our case; and see Co. lib. 8. Francis his case, where they ought to take notice at their perill, and a marriage is an Ecclesiasticall Judgment of which he ought to take notice, and he was interrupted, for all the Justices went to the Parliament. And divers Presidents were cited, that there need no notice to be given in this case: And it was agreed that Judgment should be given for the Plaintiff: And in Trinity Term next following, Judgment was accordingly given for the Plaintiff.

The same Term in the same Court.

Sir George Reynolls Case.

Sir George Reynoll Marshall of the Marshalsey of the Kings Bench, brought Debt upon a Bond, the Condition whereof was, that the Defendant shall be a true Prisoner, and it was doubted whether the Bond were within the Statute of 23 H. 6. cap. 10.

What Bonds a Sheriff or Marshall may take.

Doderidge, It is not to be understood by this Statute that a Sheriff, Celer, or Marshall shall take no Bond, for if the Marshall hath a man in execution, and fear that he will escape, and he takes Bond of him, this Bond is good.

Jones, The intent of the Statute, that the Sheriff or Marshall shall not suffer Prisoners to go at large, for that is within the Statute.

And it was ruled in the Kings Bench, that the Marshalsey should be enlarged, and this shall be called within the Rule, and if the Marshall take a Bond to tarry there it is good, but if he suffer him to go at large, it is not good.

Within the Rules of B. R. what it is.

The same Term in the same Court, Sury *versus* Albon Pigot, and three other Defendants, Intr. Hill. 1. Car. Rot. 124.

In an action upon the case for stopping his water-course, the Plaintiff declares that 14. Octob. 22. Jac. he was possessed of the Rectory of M. in Barkshire, of which a Curtilage was parcell, and that in this Curtilage is and hath been time out of mind a watering place, for the watering of the Castell of the Plaintiff and others, and for other necessary uses, and that a certain water-course had time out of mind flowed from Mildford stream to this Curtilage, and that this water filled the said Pond; and further that the Defendant well knowing this, and intending to dam up the said watering-course, built a stone Wall thereupon whereby the water-course was stopp'd up, to the Plaintiffs damage of 20 l. and this was laid with a Continuando. The Defendant plead that 3 H. 8. the said H. 8. was seised of the Mannor of &c. and of the said Rectory in his Demesne as of Fee, and of a certain piece of Land called the Popyard lying between the said watering-place and the said stream, and by his Letters Patents granted this to William Box and his Heirs, by virtue whereof he was seised: Francis Searles entred upon him and was seised, and enfeoffed Pigot, 20 Jac. by virtue whereof he was seised, &c. and the three others justifies as Servants to Pigot, that they the said day and year filled up the said water-course, as it was lawfull for them to do: and that this is the same Trespasse, &c. The Plaintiff demurs. And the question is, whether the unity of possession of all in H. 8. hath extinguished the water-course.

Whether unity of possession in severall lands, shall destroy a Water-course.

And by Dorrell for the Plaintiff, if it were of a Common, it is clear, that it is destroyed, because Common ought to be in another mans Land, but not in our case, for if one prescribe to have Warren, if he purchase the Land yet he shall have Warren, 11 H. 7. 25. there are two houses, and the one prescribe that the other shall mend the Gutter, and afterwards they come to the hands of one man, and then he alien one of them, this unity shall destroy the mending of the Gutter.

Berd for the Defendant, that the unity hath destroyed the custom, 21 E. 3. 2. A way is but an easement, yet by the purchase of the Land the way is extinguished, and also the watering-course is not only an easement but a profit, or Prender; and he cited Dyer 295. in case of an Inclosure, that the Inclosure is extinguished, but there is made a quare, and he cited 38 Eliz. in C. B. an opinion, that by purchase of a Close the Inclosure is extinguished; a fortiori here because it is a profit: And for the case of 11 H. 7. it is by the custom of London, but there is no custom in our case, and the case of a Warren is not like to our case, because a man may have Warren in his own Soil; And in Michaelmas Term next the case was argued again by Barksdale for the Plaintiff, that the unity of possession in H. 8. had not extinguished the water-course, and that the Terminus ad quem, and the Medium also being in one, had not distinguished nor destroyed it. And 1 Col lib. 4. 26. Benedictus est expositio quando res redimatur a districtione; The Law will not destroy things, but the Law will sometimes suffer a fiction (which is nothing in rerum natura) ut res magis valeat. I confesse that profit appender as Common, or Rent is extinguished by unity of possession, for Common it appeareth in 4 E. 3. and Co lib. 4. Terringham's case; And for Rent it appeareth in 4 H. 4. 7. and in 21 E. 3. 2. it appeareth that a way is extinguished by unity of possession, 3 H. 6. 31. Brook Nuisance 11. for it is repugnant for a man to have a way upon his own Land: But I conceive that our case differs from the case of a way, and that for this reason; where the thing hath a being and existence,

likewiſe, notwithstanding the unity there it is not deſtroyed by the unity, but the Water-course hath a being notwithstanding the unity, ergo, &c. I will prove the major propoſition by theſe caſes, 35 H. 6. 55, 56. Where a Warren is not extinguiſhed by a feoffment of the Land, for I may hawk and hunt in my own land as in another mans, ſo the Warren hath exiſtence, notwithstanding the unity, Dyer 326. Where the Queen was ſeſſed of Whaddon Chaſe, and the Lord Gray was Lieutenant there in Fee, and he and his Anceſſors and their keepers had by preſcription uſed to hunt wandering Deer in the Demains of the Manor of S. adjoining as in Burliours: the Manor of S. comes into the Queens hands, who grants this to Forreſcace in Fee, with free Warren within the Demains, &c. it was holden that the unity doth not extinguiſh the Parlieu, Dyer 295. Two Cloſes adjoin, the one by preſcription is bound to a fence, the Owner of one purchaſe the other, and ſuffer the Hedges to decay, and dies, leaving two Daughters his Heirs, who make partition: Quare whether the preſcription for the Incloſure be revived, true it is that it is made a quare, but he ſaith, ſee the like caſe, 11 H. 7. 27. of a Gutter which proves our caſe, as I will ſhew afterwards.

For the minor propoſition that the watering bath being, notwithstanding the ſaid unity, I will prove it by 12 H. 7. 4. A Precipe quod reddat of Land Aqua Co-opert Mich. 6. Jac. Challenor and Moores caſe. An Ejectione firmæ, was brought of a Watering-course, and there reſolved that it does not lye of it, becauſe it is not firma, ſed currit, but of Terra aqua co-operta, it doth lye. Alſo I will take ſome exceptions to the Bar, there is no Title in the Bar for the Defendant Pigot, and ſo we being in poſſeſſion, albeſt in truth we have no Title, yet he who hath no Title cannot ouſt us, neither can ſtop the ſaid Water-course, and it is only ſhewn in the Bar that Searles entred and entroſſed Pigot, but for any thing as yet appears the true Owner continued in poſſeſſion, 21 Jac. C. B. Cook againſt Cook in a Writ of Dower, the Defendant pleads an Entry after the Darrein continuance, and doth not plead that he ouſted him, and upon this the Plaintiff Demurs, and there adjudged that it is no plea in Bar, becauſe he doth not ſay, that the Defendant entred and ouſted the Tenant. 2. Exception, the action is brought againſt four, Scil. Pigot, Cole, Branch, and Elyman; and Pigot hath conveyed a Title from Searles, the three other Defendants juſtifie, but Pigot doth not ſay any thing but that Searles entroſſed him, 7 H. 6. an action of Waſt is brought againſt many, one answers, and the other not, this is a diſcontinuance: And for the principall matter, I will conclude with 11 H. 7. 25. Broo. Extinguiſhment 60. Two have Tenements adjoining, and the one hath a Gutter in the others Land, and afterwards one purchaſe both, and then he alien one to one, and another to another, the Gutter is revived notwithstanding the unity, becauſe it is very neceſſary, and ſo he prayed Judgment for the Plaintiff. Bear for the Defendant: I in a manner agree all the caſes which have been put on the other ſide; and I conceive that the Water-course is not Stagnum but Servitium, which is due from the one land to the other: It is but a liberty, and therefore I agree Challenors caſe, which is but a liberty that an Ejectione firmæ doth not lye of it, but Ejectione firmæ lies De ſtagno.

For the ſecond exception I answer and confeſſe, that to alledge an Entry after the Darrein continuance, without alledging an Ouſter of the Tenant, cannot abate the Writ, for the Defendant may enter to another intent as appeareth in the Commentaries, and with the aſſent of the Tenant; But here it was alledged that a feoffment was made and a Liberty which implies another.

For the matter in Law, I conceive that the Water-course is extinguiſhed, and it may be compared to 21 E. 3. 2. The caſe of a way which is extinguiſhed by unity of poſſeſſion, Hill. 36. Eliz. Rot. 1332. Hemdon and Crouches caſe

case. Two were seised of two severall acres of Land, of which the one ought to inclose against the other, one purchase them both, and lets them to severall men, and there the opinion was, and adjudged accordingly, that the Inclosure is not revived, but remains extinguished, 39 Eliz. Harringtons case, the same thing resolved, and albeit in Dyer 295. is a quere, yet the better opinion hath been taken according to these resolutions, H. 4. Jac. Jordan and Ayliffes Case, when one had a way from one acre to another, and afterwards he purchased the acre upon which he had the way, and afterwards sold it, and in that Case the opinion of 3. Justices was that the way was extinguished; also 11 H. 4. 50. and 11 H. 7. 25. prove this case, for the said case is compared to the custome of Gavelkind and Burrough English, and there the quere is made whether by the custome it be revived, and if it be a custome which runs with the Land, the unity of possession doth not extinguish it, Co. lib. 4. Terringham's case, and 24 E. 3. 2. common appendant is destroyed by unity of possession, and yet it is a thing of common right, but a Water-course being a thing against common right, a fortiori it shall be extinguished. Now I will take some exceptions to the Declaration.

1. Because he hath laid a prescription for a Water-course, as to say, that it was belonging to a Rectory, to which, &c. and this is a good exception, as appears by 6 E. 6 Dyer 70. Ishoms case, where exception was taken, that before his prescription he doth not say, that it was Antiquum parcum, which exception (as it is there said) was the principall cause that Judgment was given against him, and also as the case is here, it ought to be a Rectory impropriate, and this cannot be before the time of H. 8. which is within time of memory, for before the said time no lay person could have a Rectory impropriate, and therefore I pray Judgment for the Defendant.

Barksdale said, that the prescription is well laid, and that he would prove by 39 H. 6. 32. and 33 H. 6. 26. and per curiam the prescription is good enough, and albeit it is not said, that it is Antiqua Rectoria, yet it is well enough, Mich. 1 Car. at Reading Term in Brock and Harris case, he doth not say, that it was Antiquum Messuage, and yet resolved good.

Doderidge, the case of 6 E. 6. differs in this point from this case, for a Rectory shall alwaies be intended ancient, and so is not a Park, for this may be newly created: and he put this case; suppose I have a Mill, and I have a Water-course to this in my own land, and I sell the Land, I cannot stop the Water-course.

Crew chief Justice seemed of opinion that the prescription is gone, and that the better opinion in Dyer 13 Eliz. hath alwaies been that the Inclosure is gone by unity of possession, but yet the Water-course is matter of necessity.

Doderidge and Whitlock, the way is matter of election, but the course of water is naturall.

Jones Justice, There is great difference between a way and a water-course as to this purpose, for admit that this water-course, after that it had been in the Curtilage of the Plaintiff, goes further to the Curtilage of another, shall not that other have the benefit of this water-course notwithstanding the unity of possession? I think cleerly that he shall.

Doderidge, my opinion is, that the water-course is not extinguished by the unity of possession: But some conceived that he had declared his opinion in terrore to the Defendant: And afterwards the same Term Barksdale for the Plaintiff said, that he had agreed the case before, and therefore would now only indeavour to answer some exceptions which had been taken to the Declaration.

1. Exception hath been that no prescription or custom is made for this water-course, but only that Currere solebat & consuevit. But I conceive that the

the Declaration is good notwithstanding this, because the Plaintiff here doth not claim an interest in the Water-course, but in the Land in which, &c. and therefore it is good, and this appeareth by 12 E. 4. 9. the Pleas of Lantones case in a prescription in a Market overt generally, and the reason there was, because he was a stranger, as in our case he is, and this pleading appeareth also to be good by Cooks Book of Entries, 18. Smiths case, which was entred 9 Jac. Rot. 366. in this Court. 2. Exception was, because it is not said, that it was Antiqua Rectoria. 3. Exception, because it doth not appear that he was a spiritual man to whom the Demise of the Rectory was made. 4. Because it is not said, that the Water-course Ad predict. Rectoriam pertinet. 5. Because the Water-course is alledged to be for his customary Tenants of the said Rectory, and this is not good, as appeareth by 21 Eliz. Dyer, 363. Prescription, Pro quolibet customar. Tenente, is not good, but I conceive that this case is not our case, for here is Customarius tenens Rectoria, and there it is agreed that Quilibet customarius tenens Maner. had been good: And the plea in Bar hath salved these objections, and therefore he prayed judgment for the Plaintiff.

Jeremy for the Defendant; And first for the matter in Law, it seemed to him that by the unity of possession the Water-course is extinguished, and the Water-course may well be compared to the case of the way, for as a way is a passage for men over the land, so water hath passage upon the land, and a way is extinguished by unity, as appeareth by 21 E. 3. 2. 11 H. 4. 5. 21 Ass. and Davies Reports 5. and in 4 Jac. Jordan, and case it was the better opinion that a way was extinguished by unity of possession; true it is, that there Popham chief Justice put the difference, where the way is of necessity and where not, for where the way is of necessity there it shall not be extinguished: This case hath been compared to the case of a Warren in 35 H. 6. but I conceive that the cases are not a like, because a Warren is a meer liberty, 8 H. 7. 5. A man may have a Warren in his own Land, and Co. lib. 7. Buts case by a feoffment of Land, a Warren doth not passe, but this Water-course hath its originall out of the Land, and this case cannot be compared to an ancient Water-course running to a Mill, for notwithstanding the unity it shall passe with the Mill, for otherwise it shall not be Molendinum aquatum, so that the water there is parcell of the thing, and so of necessity ought to passe with the thing, but here it doth not appear that it is a Water-course of necessity, and for any thing that appeareth, it may be filled with another Water-course: Also I conceive that the Declaration is not good. 1. Because neither prescription nor custom is laid for the Water-course, and it appeareth in Co. Book of Entries, Holcome and Evans case, and the old Book of Entries, 616, 617. Mich. 1. Car. Rot. 107. Turner and Dennies case in this Court, in trespass for breaking his Close, &c. the Defendant justified for a way, &c. and that he was possessed for years, and for him and his Occupiers had a way over the Land, the Plaintiff demurred, and resolved that the prescription is not good. 2. The Declaration is insufficient being an action upon the case for the stopping of a Water-course, and it is not Vi & armis, nor Contra pacem, Co. lib. 9. 50. the Earl of Shrewsburies case, when there are two causes of an action upon the case; the one Causa causans, the other Causa causata, causa causans may be alledged Vi & armis, for this is not the immediate cause of the action, but Causa causata F. N. B. 86. H. and 92. E. in the end of the writ of action upon the case shall be Contra pacem. 3. Also he hath prescribed for the Tenants of the Rectory, which is not possible, for no Lay-man could be Tenant of a Rectory, or of Witches be, for the Statute of H. 8. and therefore I pray Judgment for the Defendant.

Whitlock chief Justice conceived that the declaration was good, & the bar is naught, both for the form & matter: the question here is of Aqua profluens, and

I conceive that there needs no prescription or custome in this case, for water hath its naturall course, and as is observed by Brudnell in 12 H.8. *Natura sua descendit*, it may be called *Ufu captio*, or *Usage*, and he conceived that the action upon the case very well lies in this case, like to the case where a man hath a house and windows in it, and another erect a new house and stop the light, then I may have an action upon the case; but true it is, that I shall not only count for the losse of the aire, but also I ought to prescribe that time out of mind light have entred by these windows, &c. see 7 E.3. If there be a School-master in a Town, and another erect a new School in the same Town, an action upon the case doth not lye against him, because Schools are for the publike benefit, and every private man may have a School in his house. And for the exception, that a Lay man cannot be possessed of a Rectory, I conceive that the Declaration is good notwithstanding, for a Layman may have a Rectory by Demise.

And for the Plea in bar, it is not good for the form, because that Scarles entred and enfeofed Pigot, and it is not said, that he entred, and Expuls, and if a man enter and make a Feoffment, the owner being upon the Land the Feoffment is void, and therefore an actual Duster ought to be shown: And for the matter in Law, he conceived that the Bar was not good, for by the unity of possession the water-course is not extinguished, and yet I agree the cases of a way and common upon the differences of Rights which are put in Bracton, lib. 4. 221. These are called Servitudes, as *jus eundi, fodendi, hauriendi*, &c. *sunt servitudes quas prædia ex quibus exunt aliis prædiis debent*, and are called *Servitudes prædiales*, and this began by private right, to wit, by grant or prescription.

A way or common shall be extinguished, because they are part of the profits of the Land, and the same Law is of Fishings also, but in our case the water-course doth not begin by the consent of parties, nor by prescription, but *Ex jure naturæ*, and therefore shall not be extinguished by unity: A Warren is not extinguished by unity, because a man may have a Warren in his own Land, and in the case of 11 H.7. the Cutter was not extinguished only by the unity of possession, but there also appeareth in the case that the Pipes were destroyed, whereby it could not be revived, and although the Book of 13 Eliz. Dyer 295. Two Closes adjoyn together, the one being by prescription bound to a fence, the owner of the one purchase, the other dies, having issue two Daughters, who make partition, it is a quære whether the inclosure be revived, yet I conceive clearly, that by unity of the possession the Inclosure is destroyed, for fencing is not naturall, but comes by industry of men, and therefore by the unity it shall be gone, and so briefly with this diversity he concluded that where the thing hath its being by prescription, unity will extinguish it; but where the thing hath its being *Ex jure naturæ*, it shall not be extinguished, and therefore the Plaintiff ought to have Judgment.

Jones Justice agreed, that the Declaration is good, and that the Bar also is good in manner, but for the matter in Law it is not good.

As to the first exception to the Declaration, I conceive it is good, albeit there wants a prescription, and this is the ordinary of pleading, as appears in Co. lib. 4. Luttrells case, and in all the precedents before cited.

2. For the exception *Vi & armis*, he conceived this difference, where the act is a Trespasse and a Pussance, there it may be laid to be *Vi & armis*, but if it be a Pussance only and not a Trespasse, it is otherwise: as if I have a way over another mans Land, if a stranger dig in the Land so as I cannot have the way, now because it is a Trespasse to the Owner of the Soil, in my action upon the case against a stranger, I may have *Vi & armis*, but if the owner stop the way, there *Vi & armis* shall not be in my action upon the case.

For the third exception, because he doth not say, *Ad Rectoriam spectandum*, but

but I conceive that it shall be intended ad Rectoriam impropria, and so it appeareth.

4. Where it is said, Watering-course for his Tenants, I conceive it is good enough, being in an action upon the case where damages only are to be recovered: That the Bar also is good in form, for although the Tenant here be a Disseisor, yet it is a good Bar, for it matters not whether he hath a Title or no, if the Water-course be extinct by the unity, for the matter in Law, he conceived that the unity of possession had not extinguished the Water-course. A man hath things out of another mans Land, either by grant as a Feignior, Rent, Common, &c. and these are distinguished by unity, &c. and the reason is, because one who hath interest as Owner of the Land, cannot have a particular interest in the same Land also. Or by prescription, and those things are extinguished by unity of possession also, and not only for the first reason because he is Owner of the Land, and so cannot have a particular interest in the same Land also, but also because that by the unity the prescription fail: And for the case in Dyer, 13 Eliz. I conceive that by the unity the inclosure is gone, and so it was resolved in 37 Eliz. for every one is not bound to inclose: For the case of the way, I will suspend my opinion concerning it, because Clark and Lambs case is now depending touching it in the same point.

But now for our case, it differs from the other cases, for the prescription here is in another manner then is made for Common, for it shall be pleaded either as appendant, or appurtenant, but Currere solebat is only in this pleading, for here no interest is claimed, but in the other cases an interest is claimed: In this case the Land remains as it was before, and therefore the unity will not extinguish it; and if such a unity by construction of Law should extinguish Water-courses, it would be too dangerous: for suppose that a man hath a Water-course from Thames to his house in Lambeth, if he purchase a parcell of Land in Hendley; now because that the Thames come by the same Land, his Water-course shall be extinguished. Also suppose that the Water-course after it hath been in the Curtilage of the Plaintiff, goes into another Curtilage, is it reason that by this unity the second man shall lose his Water-course? without doubt it is unreasonable. And the case of 11 H. 7. of the Butte, warrants this opinion, and therefore the Plaintiff ought to have Judgment.

Doderidge Justice, I conceive no great difficulty in the case; for the exceptions to the Declarations they are not materiall.

1. That there wants Prescription or Custom, I conceive that it is good enough, for here are the words of Currere solebat & consuevit, and Consuevit is a good word for a Custom.

2. That a Lay-man cannot have a Parsonage; true it is, that a Lay-man cannot be a Parson, but he may have a Parsonage, for he may be Lessee of it, which appeareth many times in our Books.

3. That it is not alledged to be Vi & armis, this is the most colourable exception, and the case and rule cited out of Co. lib. 9. the Earl of Shrewsburies case is good Law, but it is impossible to plead Vi & armis in this case, for the unity was in H. 8. and the wrong is supposed after the severance, and it is supposed to be done by the Owner of the Land, and a man cannot do a thing upon his own Land Vi & armis.

4. Because it is not alledged to be an ancient Rectory: I conceive it need not, because the Law presumes all Rectories to be ancient, the Patronages wherof are gained Ratione fundi, foundationis, vel dotationis.

5. Because he doth not say, that Pertinet ad Rectoriam: But he hath said a thing which amounts to as much; for it is said, that in the Rectory was a certain Curtilage in which there is a Watering-pond, and the Curtilage is

is part of the house, and therfore he need not say, that it belongs to the house. For the Bar I conceive that it is good for the Mannor: A man makes a Feoffment of Land, the Owner of the Land being present at the same time, nothing works by the Libery for the reason before given by Jones. For the matter of Law he conceived that the unity of possession doth not extinguish the Water-course, and that for two reasons.

1. For the necessity of the thing.
2. From the nature of the thing being a Water-course, which is a thing running.

1. For the necessity, and this is the reason that common appendant by the unity of possession shall not be extinguished, for it is appendant to ancient Land-hide, and gain arable Land, which is necessary for the preservation of the Common-wealth; and as in this case there is a necessity of bread, so in our case there is a necessity of water: And for the case of a way *Distinguendum est*, for if it be a way which is only for easement it is extinguished by unity of possession, but if it be a way of necessity, as a way to Market or Church, there it is not extinguished by unity of possession, and accordingly was the opinion of Popham chief Justice, which I take for good Law, and the case of 11 H.7.25. is a notable case, and there a reason is given why autter is not extinguished by unity of possession, because it is matter of necessity.

2. From the nature of water, which naturally descends, it is always current, *Et aut invenit aut facit viam*, and shall such a thing be extinguished which hath its being from the Creation. Co.lib.4. Luttrells case, a Mill is a necessary thing, and if I purchase the Land upon which the streams goes which runs to this Mill, and afterwards I alien the Mill, the Water-course remains. So if a man hath a Dye-house, and there is a water running to it, and afterwards he purchase the Land upon which the water is current and sell it, yet he shall have the Water-course, Dyer: Dame Browns case, and the principall case in Luttrells case, a Fulling-mill made a Water-mill, this shall not alter the nature of the Mill, but yet it remains a Mill, so the water hath its course notwithstanding the unity, and he concluded for the Plaintiff.

Crew chief Justice, I agree that the Declaration is good, and also that the Bar is good for the manner, but for the matter in Law, I conceive that it is not good. In our Law every case hath its stand or fall from a particular reason or circumstance: For a Warren, and Witches they are not extinguished by unity, because they are things collateral to the Land: And for the case of 13 Eliz. in Dyer, of an Inclosure; I conceive that by the unity the Inclosure is destroyed, for the Prescription was interrupted, and in Day and Drakes case, 3 Jac. in this Court it was adjudged that in the same case the Prescription was gone; It may be resembled to the case of Homage Ancestrell 57 E.3. Fitzherbert Nufans: And for our case it is not like to the cases of Common, or a Way, because the Water-course is a thing naturall and therfore by unity it shall not be discharged; also there is a linement out of which every man shall have a benefit, and therfore he concluded that Judgment should be given for the Plaintiff; And Judgment was commanded to be entered for the Plaintiff.

The same Term in the same Court.

Welden *versus* Vefey.

An action of Debt was brought by Welden Sheriff of the City of Coventry against Vefey, upon the Statute of 29 Eliz. cap. 4. and declares, that it is provided by this Statute that no Sheriff or Minister, &c. shall take for an execution, if the sum doth not exceed 100 l. but 12 d. for every 20 s. and being above the sum of 100 l. 6 d. for every 20 s. and shews that whereas the said Vefey had judgment against one in an action of Debt, that the Plaintiff by virtue of a Capias directed to him, took the body of the said person condemned, and that it was delivered to the Plaintiff, and that he for levying of the money had brought this action.

The Defendant by way of Bar saith, that it is provided by this act that it shall not extend to Executions in Towns Corporate, and that this was within Coventry, and so demurred upon the Declaration.

And Whitwick argued for the Plaintiff; two things are considerable in this case.

1. Whether where the sum exceeds 100 l. the Sheriff shall have 12 d. for every 20 s. of the 100 l. and 6 d. for that which is over, or 6 d. only for every 20 s. for all the sum.

2. Whether this Statute extend to Judgments in Towns Corporate. For the first, the letter of the Statute is clear that he shall have 12 d. for the first 100 l. and 6 d. for the residue, for the Statute is, that if it be above 100 l. that he shall have but 6 d. therefore if it be under a 100 l. he shall have 12 d. for every 20 s. And the meaning of the Statute is plain also, for otherwise the Sheriff shall have a lesser Fee where it is above a 100 l. (as where it is a 199 l.) then he shall have for 100 l. but this was not the intent of the Statute, but the greater the Execution, the greater the Fee: It was adjudged in one Gores case, 10 Jac. that an action of Debt lies upon this Law, Pasch. 14 Jac. Rot. 351. Broke and Tumbler's Sheriffs of the City of London, brought Debt against Nathanael Michell for execution of 400 l. for 12 l. 10 s. scil. 5 l. for the first 100 l. and 6 d. for every 20 s. after: But I confesse that the principall question there was, whether an action of Debt lies for the money, and it was resolved that it did, and Judgment was given for the Plaintiff.

2. As to the Proviso, that this doth not extend to Fees in a Town Corporate, whether this extend to executions which go out of Judgments in this Court, or in the Common Pleas into Towns Corporate. The Statute shews that before that time the Sheriff had taken great Fees, which the Parliament considering, restrained them to a certainty; The words of the Proviso are generall: Provided that this Act shall not extend to any Fees to be taken for any Execution within any City or Town Corporate, and although the words be generall, yet the exposition shall be according to reason, as it is said in Fulmerston and Stewards case in Plow. Exposition, shall be made against the words, if the words be against reason, 5 H. 7. 7 38 H. 3. Broo. Live-ry 6. The King shall have primer Seisen of all Lands of his Tenant which he holds of him in Capite, but if one holds of the King in Capite, in Socage, he shall pay no primer Seisen to the King, and this Statute shall have this intendment, that this Proviso shall extend only to Executions upon Judgments given in Cities and Towns Corporate, and not where Judgment is given in this Court, or the Common Pleas, and Executions are only there, and this seems to be a reasonable construction; Executions in Towns corporate, to wit, Executions upon Judgments given in Towns corporate. If the Sheriff make execution at the Town side he shall have for his fees as the Statute limits, & therefore he shall have it if within the Town, & if this should not

Salt. 331
2 Mod. 240
2 Pl. 24 1102

Whether a Sheriff, or, &c. shall have 12 d. in the pound for the first 100 l. and 6 d. for the rest upon an Execution.

be so, this mischief would ensue, that presently when an Execution issues out against a man, he will shelter himself in a Town corporate, as in a Sanctuary, and the Sheriff will not do execution there, because he shall not have so great a Fee for doing it as if it were in another place, and so execution (which is the life of the Law) shall be undone.

Jermy for the Defendant; and first, if the sum exceed a 100 l. he shall have but 6 d. for every 20 s. of all. It is considerable that at Common Law the Sheriff ought to do execution freely without any recompence. In Both and Sadlers case lately in this place, an action upon the case was brought by a Bailiff, that whereas a Warrant for taking such a man was directed to him, the Defendant promised him 40 s. for his pains, he took the man and brought an action for the 40 s. and it was agreed that he should not have it. The Law abhors that great Fees shall be given for executions, Co. lib. 3. 7. in Heydons case: In the exposition of the Statute three things are considerable.

1. What the Common Law was before the making of it.

2. What the mischief was at the Common Law.

3. The remedy which the Statute gives.

4. The true reason of the remedy. The Common Law was, that the Sheriff shall not take any Fee for execution, Ergo now he shall take as small a fee as may be, because this is nearest to the common Law: And the first words are declarative what Fees he shall take, and the subsequent words affirmative what Fees they may now take, to wit, where the sum doth not exceed a 100 l. 12 d. for every 20 s. 14 Jac. It was objected, that the Sheriff is not bound to do execution before he hath his Fee, and then it was resolved that he might have an action of Debt, and so it seems that the party is not bound to give lying money before that the execution be done, and otherwise, the party Plaintiff may be at great mischief if the other be not taken: And it hath been agreed lately in the Common Pleas, that if the sum exceed 100 l. he shall have but 6 d. for every 20 s. And as to the second point, he endeavoured to maintain that the Proviso extends to executions in Towns corporate, although the Judgments upon which the executions issue are given in other Courts, and this is the constant practise of the City of London.

The Judges delibered their opinion, with a protestation, that they might recall them, if afterwards better reason appeared.

Crew chief Justice was of opinion that he shall have but 6 d. for every 20 s. if the sum exceed 100 l. and the sum shall not be divided, but if the sum be under a 100 l. then 12 d. for every 20 s. and this is the reason of the Law.

And for the second point, although the Judgment be given in the superior Court, yet if the Sheriff does execution there, he shall have his lying money, and this is within the intention of the Proviso.

Doderidge, Justice the first question is upon the exposition of the Statute, the second upon the Proviso: For the first two expositions may be made as hath been remembred, then we will enquire of the interpretation: This Statute was made for the benefit of Sheriffs, that as they are in hazard by taking of men, because many times resistance was made. 2. When the Sheriff had taken a man, and in the carriage of him to prison he had escaped, an action upon the case did lye against the Sheriff, and when he had him in prison, he ought to have great care in keeping of him, for an action lies against him if he escape: and therefore although on the one side there was a great mischief by reason of great Fees that the Sheriff took for execution; so on the other side, the Law tended Sheriffs in respect of the hazard and care which they had of men in execution, and therefore the Law in an indifferency provides that the Sheriff shall have a good Fee for execution, and also it provides against his extortion, and so it is indifferent between the oppression of the Sheriff and covetousness, and we are not to judge according to

to the intent, but according to the equity of the Law, for equality to prevent the covetousnesse of Sheriffs and the oppression of the people; then in this case if he shall have but 6 d. for every 20 s. for 200 l. he shall have no more for execution of 200 l. then if it were a 100 l. But I think this was not the intent of the Act.

For the second point, I take it that this Statute did not extend to Suits within Towns corporate, and executions upon them, for they are not at any great trouble for doing of execution within their Towns, nor hazard: But if a Sheriff does execution in a Town corporate, then he shall have according to the Statute, for it may be that the Prison is far distant. And I upon the suddain conceive that this Proviso extends only to Towns corporate, which are Counties.

Jones Justice, three questions have been made upon this Statute.

1. For the nature of the action which the Sheriff is to have upon this Statute, and for that it hath been many times resolved that he shall have an action of Debt, for when a remedy is given by a Statute, and no action is given by the same Statute whereby the penalty shall be recovered, there he shall have an action of Debt.

2. Who shall have the Fee when the Sheriff makes a Warrant to a Bayliff of a liberty, the Bayliff of the liberty or the Sheriff.

The second branch of the second question is, that when one Sheriff makes the extent, and another Sheriff makes the Liberate, who shall have the Fee?

3. The third question hath been in debate in the Common Pleas, and there was some opinion that if the sum be above a 100 l. and under 200 l. that the Sheriff shall have 12 d. for every 20 s. of the first 100 l. for otherwise the Sheriff shall have a lesse for execution of 199 l. then he shall have for 100 l. But if it be above 200 l. he shall have 6 d. ab initio.

My opinion on the suddain is, that for every 20 s. of the first 100 l. he shall have 12 d. and for the residue he shall have 6 d. for every 20 s. and the other shall not be altered.

And for the second point, I hold that this Proviso extends only to Judgments originally commenced in Towns corporate, and not to executions upon Judgments given in superior Courts, for then the Sheriff does execution as an Officer to these Courts: And the Sheriff of the County is at as great pains, as if he were Sheriff of another County, and shall not be bound by the Proviso.

Whitlock Justice was for the Plaintiff in both the points, to wit, that the Sheriff shall have 1 s. for every 20 s. of the first 100 l. and 6 d. for every 20 s. of the residue. And by him the Sheriff may refuse to do execution untill the leying money be paid to him.

And for the second point, the Sheriff of the County of the City is not within the Proviso, but shall have the fees by the Statute provided, as well as the Sheriff of the County shall have, for the words are generall, and the exception goes to all Towns corporate and Cities, but doth not say Cities which are Counties, and therefore this Sheriff is within the benefit of this Law: And in Michaelmas Term next following the case was moved again by Whitlock for the Plaintiff, and he said, that he would not speak to the second point, because the Court had delivered their opinion, that the Proviso in the Statute, that this shall not extend to executions in Towns corporate, it is to be intended of executions in Towns corporate upon Judgments there given: But for executions there upon Judgments given in this Court, or any other superior Court, the Sheriff shall have such fees as are limited by this Statute. And the Court said to him that were agreed of it.

And as for the first point, he conceived that the Sheriff shall have 12 d. for leying of every 20 s. of the first 100 l. and 6 d. of every pound more, and this

this appears clearly by the Letter of the Statute : And the case in Mich. 19 Jac. in C.B. between Empson and Bathurst doth not make against it, for the resolution of the said case was upon other matters : The case being, a man was bound in a Statute of 120 l. the Sheriff extends, and before the Liberate takes double Bond of the party for payment of his Fees, and afterwards brought Debt against the party, who pleads the said matter in Bar, and the Statute of 23 H.6. cap. 10. And in the case were three points.

1. Whether the Sheriff may take a double Bond for the payment of his Fees, and it was resolved that the Bond was void, for the Sheriff might have Debt upon the Statute for his Fees.

2. Whether the Sheriff shall have his Fees before the Liberate, and resolved that he shall not.

3. Was this very question, and two Justices were against one, that where the sum exceed 100 l. he shall have but 6 d. for levying of every 20 s. of the first 100 l. But the Judgment was given upon the other points. All the Court seemed to be of opinion that he shall have 12 d. for every 20 s. of the first 100 l. and 6 d. for every 20 s. of the residue.

The same Term in the same Court.

Awdeley *versus* Joye.

AWdeley being put out of the Town-Clarkship of Bedford, moved for a Writ of Restitution to the place, and it seemed to Doderidge Justice that the Justices of this Court have power to grant restitution in this case, and he cited a case in 16 Eliz. in this Court, where restitution was granted in such a case, and 43 Eliz. by warrant of Fennor Justice, a Writ of Restitution was granted.

A Writ of Restitution to a Town-Clark being ousted of his Office.

One who was Town Clark of Boston for life, was made Alder-man and put out of his Clarkship, and was restored. This Court hath power not only in judiciall things, but also in some things which are extrasudicial. The Mayor and Commonalty of Coventry displaced one of the Alder-men, and he was restored ; And this thing is peculiar to this Court, and is one of the flowers of it.

Crew chief Justice, doubted whether restitution could be made to Awdeley, or no, because the Office was granted to him in Reversion, when it was expectant upon an Estate for life, and when the Officer for life died, Joye was elected, and he said, that all the said Writs remembred are, where he had once possession.

Whitlock Justice, in the case of one Constable, 10 Eliz. It was resolved that this Court hath power to grant restitution in such a case, where he was put out of his Office : And by Jones Justice, this Court hath power to grant Restitution, and he remembred, one Mittlecots case : And Noy being of Counsell with Awdeley said, that there are Presidents to prove this in the times of E.2.E. 3. and H.6. And it was said by the Justices that they are the chief Conservatoys of the Peace within the Realm, and therefore have power for the preservation of the Peace in such factious Towns to grant restitution.

The same Term in the same Court.

Dabborne *versus* Martin.

Thomas Dabborne brought an action upon the case against Martin for these words, Thou art a Knave of Record, and a forgering Knave: And it was argued by Jermy for the Defendant, that the words were not actionable, for a Knave signifies a Male-child, so that it is no more then to say, Thou art a Male-child of Record: And for forgering Knave, the action will not lye, for forger is a generall word, and may be applied to divers Trades, as forgering Smith, forgering Goldsmith; and when he called him forgering Knave, there was no communication of his Office, 18 Jac. Sir William Brunskill brought an action upon the case, and declared that he was well descended, and was a Gentleman of the Chamber to Prince Henry, and he brought an action for these words, Thou art a Cosener, and livest by cosenage, and adjudged not actionable, Co. lib. 4. 16. Action upon the case doth not lye for these words, Thou art a corrupt man, if there were no communication touching his Profession; And it was argued for the Plaintiff that the words were actionable, for it lyeth for these words, Thou art an Out-putterer, if they were spoken in Northumberland where they are understood, but not here, because they have no signification: And the words here are speciall and shall have reference to his Office, and shall have such an interpretation as is now used, and now Knave hath no signification of Male-child.

Words,
Thou art a
Knave of Re-
cord.

Jones Justice said, that if one saith, that such a one is a corrupt Judge, action lies, or if one saith of a Clark, that he is a forgering Clark, action lies: And in 28 Eliz. the opinion of Justice Fennor was, that for these words (Thou hast forged my Fathers Will) action lies.

Crew said, that he did not understand the word (Forgering) but for calling one Knave of Record, action lies. And Doderidge Justice said, that he never gave way to these actions upon the case for words: And no opinion was given this day.

The same Term in the same Court.

Goodwin *versus* Willoughby.

Goodwin brought an action upon the case against Joane Willoughby wife of Thomas Willoughby, and upon non Assumpsit pleaded, it being found for the Plaintiff, it was moved in Arrest of Judgment. 1. That the Plaintiff shews that Thomas Willoughby was indebted upon account, and doth not shew that Joane Willoughby is Executrix or Administratrix, and yet that she promised to pay, whereas in truth she hath no cause to pay, for there is no consideration, and so Nudum pactum.

Jermy for the Plaintiff: for the first, because it doth not appear for what cause he accounted; Answer, that this is but a meer conveyance: And for the second, that she does not suppose that the feme is executrix, &c. But there is a good consideration, which is, that she shall not sue or molest, and that he gave day for payment, this is a sufficient consideration. But Stone of counsell with the Defendant said, that the first is the ground of the action, and therefore he ought to shew for what he accounted.

Crew chief Justice, two exceptions have been taken, 1. For the alleging the manner of the account, which I conceive is good enough, and he need not shew the title of the account: And as to the second, because it doth not appear that she is Executrix, or Administratrix, and so no consideration, and so no Assumpsit: But here she assumes to be Debtor and makes a promise to pay, which is an acknowledgment of the Debt by inference, and therefore he conceived that the Assumpsit was good.

Doderidge Justice, for the first it is good enough, yet Cum indebitatus exigit is no good Assumpsit, but here he shews a speciall way of Debt, and it would be long and tedious to describe his account. For the second there is no cause of action, because it doth not appear that she is Executrix or Administratrix, or Executrix of her own wrong.

Where forbearance without cause of action, is no ground of an Assumpsit.

If I say to one do not trouble me, and I will give you so much, this is not actionable, for there ought to be a lawfull ground, and for this cause the Declaration is void, for it is only to avoid molestation: Give me time, &c. this is no good Assumpsit, for forbearance is no ground of action where he hath no cause to have Debt.

Jones Justice agreed in the first with them, because a generall action upon the case sufficeth, and in truth it is but an inducement to the action; but for the other part he doubted, and he cited one Withypools case, an Infant with in age, promised to pay certain money, he makes an Executor and dies with in age; the Executor saith to him to whom the promise is made, forbear and I will pay you, and there an action upon the case did lye against the Executor upon this promise, and yet it was a void Contract, but there was colour of action, forbear till such a time, now the other hath lost the advantage of his Suit: But he gave no opinion.

Crew, It is a violent presumption that he is indebted: But by Doderidge here is no colour to charge her, but only by inference that she is Executrix.

If a stranger saith, forbear such a Debt of J.S. and I will pay it, it is a good consideration for the losse to the Plaintiff, and in this case it appears not that there is any cause, and Broom Secondary said, that Withypools case before cited was reversed in the Exchequer Chamber.

Jones, If an Infant makes a promise, it is void, and he may plead non Assumpsit, which Doderidge did not deny: But upon his Obligation he cannot plead Non est factum, for he said that he shall be bound by his hands, but not by his mouth.

The same Term in the same Court.

Drope versus Theyar.

A Debt by Drope against Theyar an Inne-keeper upon Illus sogned, and La Merdit for the Plaintiff, Bolfred moved in Arrest of judgment for the Defendant, and the matter was that one Rowly who was servant to Drope, lodged in the White Heart at S. Giles, and there had certain Goods of his Masters which were stolen from him in the night, and Drope the Master brought an action thereupon, and it was moved by Bolfred that the Plaintiff was without remedy.

1. Because it was in an Inne in London, for the Register 105. is Quando quis depraedatus euns per patriam, which (as he said) could not be extended to an Inne in London.

2. It ought to be an Inne, as Inne-keeper.

3. He ought to be as a Guest lodging, and this appeareth in Culeys case, in 5 Jac. in Celly and Clarks case (which was cited Pasch. 4. Jac. Rot. 254. It was adjudged that where the Guest give his Goods to his Host to deliver to him three daies after, and the goods are lost, that an action is not maintainable against the Inne-keeper for them, and this was in an Inne in Uxbridge: And in one Sands case, where the Guest came in the morning, and his Goods were taken before night, he shall have an action against the Inne-keeper.

4. The Goods ought to be the Goods of the party who lodgeth there, for the words are Ita quod hospitibus damna non eveniant, and here the Master who brought the action was not Guest: But admit the Master shall have the action, yet he ought to alledge a custom that the Master shall have the action for the Goods taken from his Servant, Trin. 17 Jac. Rot. 1555. Bidle, and the Master brought an action for Goods taken from the Servant, and there it was resolved that he ought to conclude that Pro defectu, &c. and apply the custom to him being Master: See Co. Book of Entries 345. And that a custom, that for other mens Goods in the custody of Guests, the Master shall have an action against the Inne-keeper if they be stolen.

Ob. This is the Common Law, and therefore ought not to be alledged.

Ans. Where a man takes upon him to shew a custom, he ought to shew it precisely, he cited Heydons case, Co. lib. 3. 28 H. 8. Dyer 38. And it was said for the Plaintiff that Goods are in the possession of the Master which are in the possession of his Servant, and so here the Master might have had action well enough, 8 E. 4. my Servant makes a Contract, or buies Goods to my use, I am liable and it is my act.

By the Court an Inne in London is an Inne, and if a Guest be robbed in such an Inne, he shall have remedy as if he were Extra per patriam: But the chiefe point was, whether the master shall have the action in the case where the Servant lost the goods, and by Jones Justice in 26 Eliz. in C. B. upon the Statute of Hue and Cry it was resolved that if the Servant be robbed the Master may have the Action, and so by him shall it be in the case Doderidge Justice, the Servant may have the Action also: If the Servant be robbed of wares, the Master or Servant may have an appeale 8 E. 2. Tit. Robbery; two joyned Merchants, one is Robbed both shall joine in the Action and may also joyn in the appeal. But it may be objected (as Whitlock Justice did) that the Master is not Hospitans, I say this is to his purpose, A man put his Horse in the Stable, and before he goes to bed by lodging, the Horse is gone, he shall have an action although he did not lodge there. For the word (transientes) although he be at the end of his Journey, yet it is within the custom, and he shall have action. And by Crew, if I send cloath to a Taylor, and it is stolen from him, the Taylor shall have an action of trespass, or the Owner.

Jones, the case of Hue and Cry is another strongest case than this is, for there the Servant ought to sweare that he is robbed, and yet the Master shall have an action: And for the word (transientes) all agreed that although he be at the end of his journey, or at an Inne in London, yet he is within the remedy of this Law: And if a man stay in an Inne a night, or a quarter of a year, shall not be liable to an action if he lose his Goods.

Doderidge agreed, that if a man be robbed in an Inne, and his Goods are stolen, he shall not have an action upon this Law. And notwithstanding this objection, judgment was given for the Plaintiff upon the Verdict.

Trin. Term, 2 Car. In the Kings Bench.

Sir William Buttons Case.

Words,
Sir William
Buttons men
have stoln
Sheep, and he
spake to me
that I should
not prosecute
them.

Sir William Button a Justice of Peace brought an action for these words; Sir William Buttons men have stoln Sheep, and he spake to me that I should not prosecute them, and it seems that the action did not lye, because Sir William did not aver that he is a Justice of Peace, and it doth not appear in what County the said Felony was done, 36 Eliz. One brought an action for these words; A. is a cosening fellow, and the greatest Pickpurse in Portsmouth, and there is not a Purse picked within 40. miles of Portsmouth but he hath a hand in it, And the action did not lye because he did not aver that there were Purses cut.

Jones Justice put this case, One saith, that A. is as strong a Thief as any is in Warwick Gaol, he ought to aver that there is a Thief in Warwick Gaol, or otherwise they are not actionable.

Doderidge put this case, There is a nest of Theeves at Dale, and Sir John Bridges is the maintainer of them, these are actionable, because it implies maintenance.

Note that it appeared upon a motion which the Attorney-generall made against one Lane (who is a Recusant in Portsmouth) that a Lease for years made by a Recusant of his own Lands after conviction, if it be Bona fide will bind the King, but if it be upon fraud and covin, then it will not; and Whitlock said, that it is a common course for Recusants to make Leases after their Indictment and before conviction.

The same Term in the same Court.

The Case of the Major, Bayliffs, and Jurates of Maidstone.

In a Quo warranto depending against the Mayor, Bayliffs, and Jurates of Maidstone in Kent, Serjeant Finch of Counsell with them of Maidstone, put the case briefly in effect thus: In the Quo warranto against them, it was ordered by the Court that they should have day to plead untill a fortnight after Trinity Term, and the truth was that they had not pleaded accordingly, whereupon Judgment was entred in the Roll, and the Writ of Seisin awarded, and execution thereupon; and afterwards by a private order in the Vacation by the chief Justice and Justice Jones, it was ordered that the Judgment should be staid, and the truth was, that it was never entred amongst the Rules of the Court, and therefore he prayed that the Judgment might not be filed, but that the last order might be observed, and that they might amend their Plea.

Hendon Serjeant on the other side said, that it could not be, for by the Judgment given the King was intitled to have the profits of Franchises which he shal not lose; & he cited the case which is in F.N.B. 21. Error in B.R. cannot be reversed the same Term before the same Justices without a Writ of Error, but otherwise it is in C.B. and he said, that the same course was observed in Eyre, there can be no pleading in Eyre after the Eyre determined, and upon this he cited the case of 15 E. 4. 7. before the Justices in Eyre, if the Defendant does not come the Franchises shall be seised into the Kings hands,

hands, nomine destinationis, and if the party who ought the Franchise doth not come during the Eyre in the same County, he shall forfeit his Franchise for ever, so here after Judgement entered, there can be no plea per que &c. Finch we have order from the Court for stay of Judgement, & here no perfect Judgement was given: and this is not without president, and he cited one Chamberlains Case, where the Judgement was nigh to perfection &c. but he did not put the Case Creve ch: Justice: in this case there was the assent of the Attorney generall, who prosecuted the Quo Warranto, and so the cases put by Hendon to no purpose, Jones upon F. N. B. 21. J. took this difference, true it is that the Kings Bench cannot reverse a Judgement although it be in the same term without a Writ of Error, but this is where error lies in the same cause in the same Court, as upon outlawry, but if no error lies in this Court for the same cause, but in Parliament. then the Kings Bench may reverse the Judgement without Writ of Error being the same term. And the Judgement here was ever of Record, for the Roll untill it be filed amongst other Rolls is no Record.

where the Kings Bench may reverse its owne judgement without Writ of Error, and where not.

And for the Case of 15. E. 4. 7. it is not like our case in reason, for when the Eyre is determined the power of the Justices in Eyre is also determined, but it is not so here, for the Justices have power from Term to Term: But Noy argued further for the King, that it is a Judgement of another Term, and Execution awarded upon it, and said that it is without president that now it should be aboyed, and upon the awarding of execution, the King under his seal hath abetted that judgement is given which cannot be falsified, and for Chamberlains Case he said that there was an assent in it. Doderidge, the Question which now is moved, is but this, whether a Judgement entered in a private Roll (as a memorandum), and afterwards there is an order that the Judgement shall not be filed, if the Judgement upon this shall be stayd: and speaks to it, and by him the Case of 15. E. 4. 7. is nothing to this purpose, for Justices in Eyre were Justices by commission, and they had not the custody of their Records, and so it differs from this case.

when a Roll is become a Record.

And Jones Justice (which was not denyed) if a Judgement be pronounced here and be not entered, the Judges may alter it the next Term. It was said by Noy in this case that all Franchises in England are against common Right, and execution of Justice, and for the present purpose, he cited one Sir John Wells Case, where in a Quo Warranto the Defendant had day to plead, or otherwise that judgement should be entered to seise, and he failed to plead at the day, and the Judgement was not filed, and yet he could not be relieved: But it was sayd by some of the Justices, that this was a case of great extremity. But by Hendon it was affirmed in the Exchequer in one Sandersons Case, and in the principall case the matter was adjourned for a fortnight, and ordered that the plea should be accorded.

Mich. Term 2. Car. in the Kings Bench.

Sharp *versus* Rust.

In an Action upon the Case, upon an Assumpsit between Sharp, Plaintiff, and Walter Rust Defendant, upon non-Assumpsit pleaded, it was found for the Plaintiff, and it was moved in arrest of judgement upon these words in the Declaration, the Defendant (being Father to the Plaintiffs Wife, for whom the Apparel was bought) said to the Plaintiff, deliver the Apparel to my Daughter, and I will pay for them, and saith not to whom the payment

where a thing
incertain may
be made certain
both in time,
estate, and
person.

ment shall be made: And it was argued by Woobrich of Grayes-Inne that this is no sufficient cause to stay the Judgement, for by necessary implication and reference of the words precedent, the certainty of the person appeareth to whom the payment ought to be made. And he observed that in our Law the time, the estate, the thing, and the person not being sufficiently expressed, yet by necessary coherence and relation to matter precedent, they are sometimes made certain enough: 1. For the time, Perkins. P. 496. puts the Rule, if a condition hath relation to an act precedent, and no time is limited when it shall be done, yet it ought to be done when the act precedent is done, and therefore if I. S. be bound to me in 20 l. upon condition that if I enfeof him of black acre, that then he wil pay me 10 l. &c. in this case presently when I have enfeofed the obligor of black acre he ought to pay the 10 l. notwithstanding there be no time limited when it should be paid. 2. For the thing being put incertainly, yet the communication precedent makes this certain, 30. H. 8. Dyer 42. in the Case of the Executors of Greenliffe, where it is agreed, that albeit it is not shown what thing is granted, yet it shall be the Land of which the communication was. 3. For the Estate, although it be incertain, yet sometimes it is made certain by the matter precedent, as in the Case Co. lib. 8. A Stewardship was granted for life, and afterwards an Annuity was granted for the exercise of that Office, without declaring what Estate he should have in that Annuity, and resolved that he should have the Annuity for life, because he had the Office for life. 4. For the person, the consideration sometimes ascertains the person, and therefore if land be given to one by Deed, habendum sibi una cum filia donatoris, in frankmarriage, this shall enure to both, because the same is Causa donationis, and by intendment of law the Land and the feme shall be given together to the man for the advancement of the feme, as it is Mich. 2. & 3. Ph. & Mary. Dyer 126. a 4. E. 3. 4. Plow. Com. 158. enfeof him & another, and bind him and his heirs to warrant, & doth not say to whom he shall warrant, yet the feoffes and his heirs shall have advantage of this warranty, for it cannot have any other intendment: 6. E. 2. Voucher. 258. 22. E. 4. 16. & Kelleway 108. & Co. lib. 8. Whitlocks Case, In a Lease for years reserving rent, it is the surest way to make the reservation to no person in certain, but to leave it to the general intendment of the Law, 15. H. 7. A man deviseth that his Land shall be sold for the payment of his debts, and doth not say by whom, they shall be sold by his Executors, because they are liable for the payment of his debts, but if one devise that his land shall be sold, & saith not for the payment of his debts, the devise is void, because the Law doth not intend in this case to make the sale 40 E. 3. 5. 4. E. 3. Fitzherbert Obligation 16. Nota, if a man be bound in debt or Covenant by writing, and puts such a clause in the writing: Et ad majorem hujus rei securitatem invenit fidei jussores quorum unusquisque in tot. & in solido se obligavit, that although none speak there but the principal in the writing, if the others put to their seals, they accept that which the principal spake, & so become principal: 2. E. 4. 20. and here in our Case it appeareth that the Deed was so, & therefore it is reason that the Declaration should be so, for there cannot be a material difference between the Declaration & the deed, & especially being upon an agreement which is to be ruled according to the intention of the parties, as it is in Plow: Com. 140. a. In our Law if any parties be agreed upon a thing, and words are expressed or written to make the agreement, although they be not apt words, yet if they have substance in them tending to the effect intended, the Law shall take them of the same substance as words usual, for the Law regards the intention of the parties, and here the intent appeareth that the assumption shall be made to the Plaintiff, although there want expresse words, and therefore he prayed Judgement for the Plaintiff. And afterwards the same Term Judgement was given for the Plaintiff.

Intention of
parties to be
observed.

The

The same Term in the same Court.

Beven *versus* Cowling.

In an Action upon the Case Littleton mooved in arrest of Judgment for the Defendant, wherein the Case was this, the Defendant assumed that if the Defendant would defer the payment of a bond, in which one A. was bound to him, and would not implead him upon it, then he promised to pay it, and he doth not say, that he deferred the payment untill such a day, and therefore this is no valuable consideration, so that the action doth not lye, for notwithstanding this he may implead him presently, Mich. 12. Jac. Kebles Case, A man promiseth to pay so much in consideration of a Lease at Will, and it was holden no good consideration, for by the same breath that he creates it, he may defeat it, & Pasch. 8. Jac. Austins Case: A man promise that in consideration he would forbear another, he would pay it, and no time was limited, and therefore it was holden no good consideration. Trin. 38. Eliz. Rot. 523. A man promise quod non implacitabit, and avers quod non implacitavit, and because of the uncertainty it was holden no valuable consideration.

Action upon the Case, upon a promise, that if he would not sue such a one, he would pay it, where good, & where not.

Doderidge Justice: If there be no consideration at the time, or no cause of Action, the forbearance afterwards will not make it actionable, and he said that it had been adjudged in this Court, that a consideration to forbear for a little time is not good, but by some to forbear for a reasonable time is good. But in the principal Case upon the hearing of the Declaration read, it appeared, that it was, that he should never implead him upon the said obligation, so that if the Plaintiff brings an Action upon the obligation, the Defendant here may have an Action upon the Case against him. Also it was non implacitabit, and this shall be taken indefinitely, quod nunquam implacitabit, and therefore the Judgment was affirmed, for otherwisse the Plaintiff shall both take advantage of this promise and of the bond also, and here he hath in a manner forsaken the benefit of his bond, and hath betaken himselfe to the benefit of this Assumpsit.

By Jones and Whitlock Justices, if A. be bound to me, and I enter into bond to him, that I will not sue this Obligation, I cannot sue him upon the first Obligation, without forfeiture of my bond: and by Doderidge, if an Obligation be forfeited, and I say to the Obligor, do not sue the Obligo, or do not implead him, an Action upon the case lies against me.

The same Term in the same Court.

Arnold *versus* Dichton.

In an Action upon the Case, and Non-Assumpsit pleaded, it was found for the Plaintiff, and Noy mooved in arrest of Judgment, that there was no consideration to maintain this Action, the Case being thus: Arnold having married the Daughter of the Defendants Testator, the Testator promised to give him 40 l. and meat and drink for a year, and a featherbed and Wolster, and afterwards the Testator in consideration that the Plaintiff would forbear to sue him all his life for it, promised that he should have as good a portion at his death as any of his children, and the Plaintiff declares, that he

Assumpsit.

he gave to one Tho. P. one of his Sons 200 l. and that he left him at the time of his death, but 30 l. but when he gave to Tho. P. the 200 l. appeares not, peradventure it might be in his life time, and this promise doth not extend to that which he had given before, as if a man be bound to keep a Goale, and that no prisoner shall escape, this only extends to a future keeping, and future escapes, and not to other escapes which were before.

True it is, that sometimes the Law will alter the sense, as in the Case of 22. H. 6. where a man is bound that his Feoffees &c. And at another day Doderidge said, that the first promise was but an inducement to the second, and the Defendant hath pleaded Non Assumpsit to the last promise, and then comes the Plaintiff and shews that he gave to such a one 200 l. and doth not shew when this was given, and this may be before the promise, and therefore I conceive the Declaration is not good: Jones agreed that the Declaration is not good, so; admit that in this case he had given to all his children but one, great portions before the said promise, and had given a small portion to one after the promise, the Plaintiff now shall have but according to the said promise, and it is alledged here, that he gave to such a one 200 l. which may be before the promise, and therefore the breach not well laid.

Whitlock contra: and that the Plaintiff shall have according to the best gift in this case, whether it were before or after the promise, and that upon the intention of the promise; so; the intention is, that the Plaintiff should have as good a marriage or portion with his Daughter, as any other of his children should have: But by Doderidge this construction cannot be made without offering violence to the words, so; then daret should be so; dedisset, and so; any thing which appeareth he had a portion before, and this was but a superaddition.

Jones put this case: I am bound to enfeoff J. S. of so much Land as I will enfeoff J. D. this extends not to a Feoffment which I have made to J. D. before, but only to a Feoffment which I shall make to him afterwards, which was not denied by Whitlock, and it was adjourned.

The same Term, in the same Court.

Barker *versus* Ringrose.

Barker brought an Action upon the Case against Ringrose, and declared, that whereas he was of good fame, and exercised the Trade of a Wool-winder, the Defendant spake these scandalous words of him, that he was a Bankrupt Rogue: and it was moved in arrest of Judgement, that those words were not actionable; so; the words themselves are not actionable, but as they concern an Office or Trade &c. and it appeareth by the Statute of 27. E. 3. that a Wool-winder is not any Trade, but is but in the nature of a Porter, so that the Plaintiff is not defamed in his function, because he hath not any: also it is not averred that he was a Wool-winder at the time of the words speaking.

Words.
Thou art a
bankrupt Rogue

A Wool-winder
what he is.

Jones Justice: If one saith of a Wool-winder, that he is a false Wool-winder, action upon the Case lieth; and it was demanded by the Court, what a Wool-winder was: and it was answered that in the Countrey he is taken to be a Wool-winder that makes up the fleece, and takes the dirt out of it: and a Wool-winder in London opens the fleeces, and makes them more curiously up, and in London they belong to the Payn of the Staple.

Doderidge

Doderidge, If one saith of a Sherman, that he is a Bankrupt, Action lyes, and so it hath been adjudged of a Shoemaker: and note that if one saith of any man (who by his Trade may become a Bankrupt within the Statutes) that he is a Bankrupt, an Action lies, as of a Taylor, Fuller, &c. And the Court seemed to incline, that in this case (being spoken of a Woolwinder in London) the Action lies: But Mich. 3. Car. the Case being moved again, the Court was of opinion, that the Action could not lye, and would not give Judgement for the Plaintiff.

*In what case
to call a man
Bankrupt, is
actionable.*

The same Term in the same Court.

NOta by Doderidge and Jones, Justices, that upon the principall Judgement reversed, the outlawry is also Ipso facto reversed: Also if an outlawry be awarded, if it be not per Judicium Coronator (unlesse it be in London) the outlawry is void.

*Outlawry re-
versed upon
reversall of
the principall
judgement.*

It was demanded by the Justices, when the outlawry and Judgement are affirmed, how the entry is: And it was answered by Broome Secondary, that the entry is generall, Quod judicium affirmetur in omnibus: and this sufficeth.

But if the Judgement be affirmed, and the outlawry reversed, then the entry is. Quod judicium affirmetur & Utlagario cassetur.

The same Term in the same Court.

Calfe, and others, *versus* Nevil and others.

A Scire facias was brought by Joseph Calfe and Joshua, Executors of A. against Nevil Davyes and Bingley, and the Case was this: they became bayle to one Hall (who was condemned in an Action to the Testator of the Plaintiff) that the said Hall should either render his body to Prison, or that he should satisfy the Judgement, the Defendants Plead, that after the Scire facias returned, and presently after the Judgement, the said Hall brought a Writ of Error in the Exchequer Chamber, hanging which, the said Hall, reddidit se prisonæ in exoneratione manucaptorum suorum: and there dyed; and the Plaintiffe demurred upon this Plea, because it was double, and Calthorp argued for the Plaintiff, that it was double or rather treble.

1. That Reddidit se prisonæ.
2. That he was imprisoned.
3. That he dyed in Prison.

And to prove the Plea double in this Case, he cited 13. H. 8. 15. 16. 4. E. 4. 4. 21. H. 7. 10. The second matter that he moved against the former was, that pendant the Writ of Error reddidit se prisonæ, and doth not conclude upon the Record, & hoc peratus est verificare, as he ought to have done, and for this he cited 7. H. 8. Kelleway 118.

If J. S. bee bound in a Recognizance, that A. shall appeare such a day before the Kings Justices at Westminster, if his appearance be not recorded hee shall not have any averment, by Bricknell, and

Conisby, and in 30. Eliz. It was one Wicks Case, which is ours in effect in case of baile, Dyer 27. 6. E. 4. 1. 2. For the matter the Plea is nought, 1. Because by the Writ of Error brought, the Scire facias against the baile is not suspended, because the Bayle is a distinct record; and upon this he cited the Case of the Ambassadors of Spain against Captaine Gifford, which was, Trin. 14. Jac. That by the Writ of Error brought the baile was not suspended, and he said that it was so resolved also in Goldsmith and Goodwins Case.

2. For the render of the principall to prison, it is not good, because it doth not appear upon Record: and for this he cited one Austin and Monkes Case, which was in 14. Jac. In Scire facias against the baile, it is pleaded that the principall had rendered himselfe to prison, and upon the matter it appeared, that the render was upon Candlemas day, which is not Dies juridicus; and so the Court this day had no power to commit him to prison, for which the Plea was adjudged voyd.

3. For the death it is no Plea; the baile by it is not discharged, because he hath not rendered himselfe in due time: and for this he cited Justice Williams and Vaughans Case, which was Mich. 3. Jac. where in Scire facias against the baile they pleaded that the principall was dead, and thereupon the Plaintiff demurred, and in this Case two points were resolved.

1. There was no Capias mentioned to have issued against the principall, and yet resolved that a Scire facias would lye against the Baile.

2. That the Plea in Bar is not good, because it may be that the principal dyed after the Capias awarded, or after the return thereof, because it appeareth that there was once a default in the principal, and so the baile forfeited, and no Plea afterwards would discharge it, and upon this he put this Case:

A Prisoner escape out of Prison, the Goaler makes fresh suit, and befoze he hath taken him, the Prisoner dies, this is the act of God, and yet because it was once an escape, an Action of Escape lyes against the Goaler: Jermyn for the Defendant; and he remembred a Case which was Hil. 20. Jac. Cadnor and Hilderons Case, that by the Writ of Error, the bayle is suspended. Nota, that it was agreed by the Court in this case, that by the Writ of Error brought in, the bayle was not discharged, because it is incertain whether the Judgement shall be reversed or not: Also it was agreed, that if the principal dies befoze a Capias awarded against him, that the bayle is discharged: It was also agreed by the Court, that the Plea was not double, for the first matters are but an inducement to the last; and yet by Doderidge, if severall matters are pleaded in Bar, and there be not any dependency on them, the Plea is double, although none of them be materiall but one.

where a Plea
is double, and
where not.

Jones Justice cited one Hobs and Tadcasters Case; which was 43. Eliz. in B. R. where after a Writ of Error brought, a Scire facias issued against the Bayle, and upon Nihil returned, the Plaintiff in the Scire facias brought in an Audita Quærela, and there the matter came in question, whether upon the Judgement the Principall ought presently render himself to prison, or that he should stay until a Capias awarded against him, and there it was resolved by Popham and all his Companions, that the Principal is not bound to render himselfe to Prison, untill a Capias be taken out; so that if he dies after the Judgement, and befoze the Capias awarded against him, the Bayle is discharged.

And in the principal Case here it was resolved, that a Scire facias does not lye against the Bayle, until a Capias be awarded against the Principal: & because no Capias in this case was awarded against the Principal (which could not be by reason of the Writ of Error) befoze his death. And also the Plaintiff in his Declaration ought to have averred, and shewn that the Capias was awarded

awarded against the Principal ; for these reasons Judgement was given quod querens nil capiet per Billa.

The same Term in the same Court.

Reynor *versus* Hallet.

In an Action upon the Case for these words, viz. Reynor is a base Gentleman, he hath four children by his Servant Agnes, and he hath killed them all, or caused them to be killed ; and after a verdict for the Plaintiff, it was moved in arrest of Judgement by Jermy, that the words were not actionable :

Words.
Reynor is a base Gentleman, he hath four children by his servant Agnes, and he hath killed, or caused them to be killed.

For 1. As to the first words, Base Gentleman, they are but words of choler.

2. The next words, He hath four Children by his servant Agnes, cannot be actionable, for although she were once his servant, yet she might be afterwards his Wife.

3. The Plaintiff hath averred in his Declaration, that he hath lived continently, and then he cannot have children by his servant Agnes, and then the words are not actionable.

And 4. For saying he hath killed them is not actionable, and upon this he cited one Snags Case, Co. lib. 4. who brought an Action for these words, Thou hast killed thy Wife ; and it appeared by the Declaration, that his Wife was alive, and therefore it was resolved, that the words were not actionable.

And as to the last exception, it was said by Ashley Serjeant on the other side, that albeit the Plaintiff hath averred in his Declaration, that he lived continently, and so in a manner confessed that he had no children, this is but for the aggravation of the offence of the Defendant : as when an Action is brought for calling one Thiefe, he avers that he lived honestly, and yet the Action will lye. But I confesse if the Plaintiff had averred that he never had any child, then it would be like to Snags Case, Co. lib. 4. 16. a. and that the Action would not lye.

But in Anne Davyes Case, there she averred, that she was a Virgin of good fame, and free from all suspicion of incontinency ; and the Defendant sayd that a Grocer had got her with child : Owen Wards Case in Cook, Book of Entries hath the same Declaration as this, and it was the President thereof. But Jermy moved another exception upon these words, he hath killed them, and doth not say Felony, which is not good, for he might kill them in execution of Justice, which is justifiable, Trin. 2. Jac. Willers Case in the Court, it was adjudged, that for these words, Thou hast stolen a peece, and I will charge thee with Felony, an Action lies not, because a peece is a word of doubtful signification.

And Trin. 20. Jac. It was resolved that these words (Agnes Knight is a Witch) were not actionable : but it was answered of the other side, that upon the whole frame of these words, they cannot be intended but to be spoken maliciously, and there can be no pretence of lawfull killing of children : Doderidge, all the words joyned together are actionable ; but these words only considered, he hath four children by his servant Agnes, are not actionable, and albeit he doth not alledge it felony, yet this is a scandall, and good cause of Action. Jones agreed, and yet he conceived, that for saying singly, that one hath a Bastard, an Action lies not, albeit the having of a Bastard be punishable by the Statute of 18. Eliz. cap. 1. But by him he hath killed the King, Hall

shall be taken in peiori sensu; otherwise it is, if the words of themselves be indifferent, as (Pope) and this word shall not be the rather taken in peiori sensu, having relation to all the sentence: for the contrariety of the Declaration, it seems to me, that the Declaration is good enough, but if one saith, Thou hast killed J. S. where in truth, there never was such a man, it is not actionable.

But here the Averment of the Plaintiff is more generall, *Ubi re vera*, he is not guilty or incontinent, which is a general allegation: but if he had averred *ubi re vera*, he never had any child, there peradventure the Action would not lye, but here it will: Whitlock Justice agreed, and he said that the first words, hath had four children by his Maid Agnes are actionable, and for the other matters they agreed, whereby Judgement was given for the Plaintiff.

The same Term in the same Court.

This Term in the Common-place, Sargeant Hendon cited this Case to be adjudged 4. Jac. A Copeholder made a Lease for yeares by License, and the Lessee dyed, that this Lease shall not be accounted assets in the hands of the Executors, neither shall it be extended: But the Case was denyed by Justice Hutton and others, and that an Ejectione firmæ lies of such a Lease.

But he said, that if a Copeholder makes a Lease for yeares by License of the Lord, and dyes without Heire, the years not expired, the Lord notwithstanding this may enter, for the Estate out of which this Lease was derived is determined: But Yelverton Justice was contra, because this License shall be taken as a confirmation of the Lord, and therefore the Lease shall be good against him, and there (as I heard) it was argued by all, that if a Copeholder makes a Lease for a yeare, this is a Lease by the Common-Law, and not customary, and shall be counted assets in the hands of the Executors of the Lessee.

The same Term, in the Kings Bench.

NOr, upon evidence to a Jury between Buffield and Byburo, the Case appeared to be this, upon a Devise with these words, I will and devise that A. and B. my Feoffees shall stand seised, and be seised to and of John Callis for life, the remainder &c. And the truth was that he had no Feoffees: and the opinion of the whole Court (*nullo contradicente*) was, that this is a good Devise to John Callis, by reason of the intention. 38. H. 8. Bro. Devif. 48. & 15. Eliz. Dyer 323. were urged for the proove of it, and by Doderidge the Case of 15. Eliz. is more strong then our Case is: Linyen made a Feoffment to his own use, and afterwards devised that his Feoffees should be seised to the use of his Daughter A. who in truth was a Bastard, and yet this is a good Devise of the Land by intention, for by no possibility they can be seised to his use.

Mich. 2. Car. *Lemasons and Dicksons Case* in the
Kings Bench.

Trin. 2. Car. Roll. 1365.

The Case was this; One Parcevall Sherwood was indebted to Susan Clarke, who brought an Action of debt, by a Bill of Middlesex, which is in nature of a Writ of Trespass against him, and Sherwood upon a mean Process was arrested by the Defendant (being Bayliff of the Liberty of White-Chappel) and being in his custody, he suffered him to escape: Afterwards Susan Clarke made the Plaintiff her Executor, and dyed, and then the Plaintiff brought an Action upon the Case against the Defendant upon the said escape; and upon issue joyned, it was found for the Plaintiff.

And Calthrop of Council with the Plaintiff, moved, that the Action will well lye, for the Testator himselfe might have had either an Action of Debt, or upon the case upon the sayd Escape, and therefore the Executor may have the same remedy, and that by the equity of the Statute of 4. E. 3. cap. 7. which gives an Action to Executors pro bonis asportatis in vita Testatoris, And by 14. H. 7. 17. this Statute shall be taken by equity, and Administrators, who are in the same mischiese shall have the same remedy, albeit they be not named in the Statute, old Nat. Brevium 103. An Executor shall have a Quare impedit for a disturbance made in vita Testator, and 7. H. 4. 6. and old Nat. Brev. 123. b. An Executor shall have an Ejectione firmæ of an ouster made to the Testator, 17. E. 3. Executors 106. An Executor shall have a Replevin of Goods taken in vita Testatoris, and it hath been oftentimes resolved, that an Executor shall have a Trover and Conversion of Goods taken and converted in vita Testator.

Doderidge, demanded of him the reason why an Action upon the Case upon an Escape in the life of the Testator, should not lye against an Executor, to which he answered, because it was a meer personall wrong. Doderidge, so is the wrong here; and he said that an Executor cannot have an action Vi & armis, for a trespass done in vita Testator, and in this case because the escape was in vita Testator, it is a personall wrong to him, for which the Executor shall not have an action upon the case.

But it had been otherwise, if the escape had beene after the death of the Testator, and the Statute of 7. E. 3. doth not extend to it, because this Statute is only for Goods, but I agree to the case of Trover and Conversion. Jones Justice, If this action upon the case will not lye by the Executor, it would be a mischievous case, for as soon as the Creditor dies, the Goods will and may suffer the Prisoner to escape, because none can have an action against him, but as it appeareth by the Case of 15. Eliz. Dyer.

The case is as mischievous for the Creditor, if the Goods suffers an escape, and dyes, for there no action lyes against the Executors. And for the case of Quare impedit, I agree to it, and so it was resolved in Brokesbyes Case, 31. Eliz. that an Executor shall have a Quare impedit for a disturbance made in vita Testator, if the aboydance be a Chattel vested, and therefore within the equity of the Statute, which gives an action de bonis Testator, and he was commanded to move it another time.

And at another day in Hillary Term, next after, Grigs said for the Defendant, that the Executor cannot have this action for an escape in vita Testator, because it is a meer personall action given to the Testator, & moritur cum persona;

C c c

and

and cited 15. Eliz. Dyer, Whitakers Case, and that it is meerly personall appeareth by 10. Eliz. Dyer 271. Where an Executor shall not be charged with an escape in vita testator, generally, where not guilty is a good Plea, there an Action doth not lye for it against Executors. And this Case is not within the equity of the Statute of 4. E. 7.

But it hath been objected that an Ejectione firmæ is within the equity of this Statute for the Executors to have it 7. H. 4. 6. but the reason there, is, because it is to recover the Term it selfe; and not damages only: and upon the same reason an Action of Covenant, upon a Covenant broken in the life of the Testator, is maintainable by an Executor, and that also is the reason of the Case of the Qua: impedit, because there the presentation is to be recovered: but in our Case damages only are to be recovered upon the escape, and so they are not alike.

2. The Arrest here is upon mean Proces, and upon a Bill of Middlesex, which is but in nature of a Trespasse before Declaration, and I conceive that if one be taken by a Cap: ad satisfaciendum at the suite of one, albeit the party at whose Suite he is taken, dyes, yet he shall be detained in execution, but I conceive the Law to be otherwise upon a Cap: ad respondend: and albeit the Plaintiff saith, that the Arrest was, ea intentione, to declare against him in an Action of Debt, yet an intent is a secret thing, and albeit the Executor represent the person of the Testator, yet he cannot follow it, and it is impossible to prove the intent.

Jermy for the Plaintiff said, that there is a difference, where an Action is brought by, and where against Executors, and this appeareth by Littletons Case, that an Action of account doth not lye against Executors for want of privity as to that purpose, but it is cleer that account lies by Executors, because this is a point of interest: And here in this Case, the Testator had interest in the body by the arrest, and this appeareth in Hichcocks Case, cited in Hargraves Case in the Lord Cooks 5. Report, and by the Arrest the body of the party is as a Chattel in the Testator: and he compared this to the case of 7. H. 4. 2. & 3. Fitzherberts Executors 52. An Executor shall have a ravishment of ward for a taking in the time of the Testator.

And 7 H. 4. 6. and a Case cited by Hankford, that if one enter upon a Statute Merchant, who dyes, his Executor shall have an assize, and therefore I conceive, that if a Tenant by Elegit be ousted and bring an Assize, if the Executors be ousted again, he shall have a reversion upon the first ouster, because the Interest continues in him which was in the first Testator, and it is to be observed in our law, that the Law enlargeth it selfe to give to Executors the same remedy which the Testator had, and thereupon he cited Co. lib. 6. 80. a. & 3. Eliz. Dyer. 301.

And in our Case the body of the party was in the Testator, as a gage till appearance, so that it was not only a personall tort. for he had an interest, and this appeareth by Co. lib. 5. 27. by a Case put in Russels Case there, and if the Executors shall not in this Case have an Action, it would be very mischievous. for so the Goalor shall suffer escapes unpunishable, 20. E. 3. Fitz. Executors 74.

But as to this reason it was answered by Jones Justice, that the same mischiefe is of the other side, if the Goaler suffer an escape and dies, an Action lies not against his executors.

Calthrop on the same side cited F. N. B. 121. a. that a man condemned in debt, and imprisoned, if the Goalor suffer him to escape, the Party, or his Executor may have debt against the Goalor: And he said, that at Common Law, Debt lay against a Goalor upon an escape, as appeares in Fitz. Debt 127. 38. H. C. placit 36. And if it were a debt in the Testator, then Executors may have an Action upon it.

But

But by Doderidge Justice in the said case, debt lies not at Common-Law, for to what purpose was the Statute made? But for the point in Question, his sudden opinion, was, the Executor shall have this Action, and that it is within the equity of the Statute of 4. E. 3. for it is a wrong, although it were upon meane Procees, and the tort continues as to the Executor, for every thing which makes to the hinderance of the Execution of the will, is wrong to him, and the performance of Wills is much favoured, because it is the last desire of the Partie who is dead, and it is for the publick weale, because by this means debts shall be paid.

And many cases are within the equity of the Statute, that are not within the letter, as those Cases which have been put, all which he agreed: Jones Justice on the sudden was against it, and that this Case is not within the equity of the Statute of 4. E. 3.

There are divers Actions which are not helped by this Statute, as Trespasse for cutting of Trees, Battery, and the like; for the Statute is, de bonis & Catallis asportat in vita testator: An Executor shall have a Replevin of Goods taken in vita testator, for by this he recovers the thing it selfe, and shall have Damages, but shall not have trespass, for he cannot punish the wrong done in the life of the Testator.

The Statute of 4. E. 3. is much enlarged by equity, as the cases which have been put, and extend also to usurpation in the life time of the Testator, as appears in Russels Case Co. lib. 5. & 32. & 33. Eliz. in C. B. in the Bishop of Chichesters case, that if the Testator dies within 6 months after the usurpation, the Executor shall have a Quare impedit. And the Case of Trover and Conversion in vita Testator, was maintained by Executors, and it was so resolved 41. and 42. Eliz. in the Countesse of Rutlands Case in both the Benches, because this is in nature of a Writ of Debitum.

Now for the Case in question, I conceive that it is not within the Statute of 4. E. 3. because it is neither bona nor catalla. Whiclock Justice contra, and that this Statute is very much taken by equity, & prater literam, though not contra literam.

But Nota, that all agreed, if it were upon an escape after Judgement, that the Action would lie by the Executors, according to the Case of F. N. B. 121. a. But the principall Case was adjourned.

And afterwards Trin. 3. Car. It was argued again by Jermy for the Plaintiff, and the sole point was, A man taken by latitat. and being in the custody of the Sheriff escape, the Party at whose suit he was arrested dies, whether his Executor shall have an Action upon the Case upon the Escape, and he conceived that he might.

It hath been objected, that it is a personall wrong, and as an Action doth not lie against Executors upon an Escape, in vita Testator, so not by Executors: To which I answer, that it is not meerly personall, but mixed with an interest.

At the Common-Law, an Executor could not have trespass for Goods taken in vita Testator, but yet he should have a Replevin, 34. E. 3. Fitz. Avoury 257. and Executors 106. So at Common-Law, a Successor should not have Trespass, for Goods carried away in the life time of his Predecessor, but he shall have a Replevin, 9. H. 6. 25, but this was remedied by the Statute of Marlebridge cap. 28. and so upon the Statute of 4. E. 3. de bonis asportat &c. Trover and Conversion hath beene adjudged within the said Statute, for the Statute hath alwayes been liberally expounded. 7. H. 4. 2. Fitz. Executor 52. An Executor shall have ravishment of Card taken away in vita Testator, and also other Statutes which do not name Executors, have beene expounded to extend to them, as the Statute of 23. H. 8. which gibes attain.

3. Eliz.

Trin. 14 Jac.
Probe and
Maynes Case,
if the party e-
scape being
arrested upon
mean Proces,
the Sheriffe is
not liable for
the Escape,
otherwise if
upon an Exe-
cution.

3. Eliz. Dyer 201. Co. lib. 6. 8. Executors shall take benefit of the pardon of 43. Eliz. and 6. E. 6. Bendloes Reports (which is cited there) Executors shall have restitution upon the Statute of 21. H. 8. and Co. lib. 5. 31. and 27. Russels Case, an Executor shall have Trover upon Goods lost in vita Testator, and this is in manner and nature of a promise to have the party in Court at the day, and it is cleer, that upon an expresse Assumpsit to the Testator, an Executor shall have an action upon the Case, and it hath been in manner agreed by the Court, that if it had been an escape of one in execution, that the action would have lyen by the Executor: and I see no difference between that and our case. And it was adjourned.

The same Term in the same Court.

UPon an Information by Heath the Kings Attorney, against two men of the County of Huntington in the name of all the County, that they ought, and used to repaire the Bridge of S. Eedes in the County of Huntington, Issue was joyned by the County, whether they ought and used to repaire this Bridge; and the Attorney gave no evidence, but put it upon the other side, for he said by the Statute of 22. H. 8. cap. if it doth not appeare that any particular person, or Towne ought to repaire a Bridge, by reason of Tenure, or otherwise, that then the County where this is, ought to repaire it.

But Nota, that the issue was, whether they ought to repaire the whole Bridge, and yet upon the evidence it appeared, that onely two Arches and a halfe of the Bridge was in the County of Huntington, and two Arches and a halfe in the County of Bedford, and the Jury found generally, that onely two Arches and a halfe of the Bridge were in the County of Huntington, and say nothing where the rest was, for they could not find a thing in another County.

And also they found that the County of Huntington ought to repaire all, but not that they used to repaire it: And at another day Hedley Serjeant moved for the County, that the Verdict was not good, because the issue was, whether they ought to repaire, and a tempore cujus contrarium &c. had repaired &c.

And the Jury hath found that they ought to repaire, which is but the halfe of the issue, and also they find that they ought to do it, which is a Question in Law, and therefore voyd, 8. H. 6. 3. 4.

Secondly, the issue is, whether they ought to repair the Bridge, and the Jury hath found, that they ought to repair two Arches and a halfe onely, &c. and the Bridge is an entire thing.

The Attorney answered, that for the first exception the case of 27. Ass. Pl. 8. is against it.

And for the last the very case of 43. Ass. Pl. 37. is against it, and therefore the Court conceived the Verdict good, notwithstanding these exceptions, Doderidge Justice, By the common Law before the Statute of 22. H. 8. if no man by reason of tenure or otherwise, ought to repaire a Bridge, the County ought to do it; like to the case of 8. E. 4. Fishers by the Law of Nations may dye their Hets upon the Land of any man.

The same Term in the same Court.

Doctor Cleland brought a Writ of error against Baldock, upon a Judgement given in where the Plaintiff declared that the Defendant, in consideration that he would do all his commands, honestly and truly for the space of a yeare, assumed to pay him 10 l. and further declared, that he had done all his honest and lawfull commands, and this promise being found by verdict, Judgement was given against Doctor Cleland, and thereupon he brought this Writ of error, and Greene assigned two errors.

Intr. Hill, 22.
Iac. Rot. 592.

1. The Assumpsit is, that he shall doe all his commands honestly and truly, and he hath declared that he hath done all his lawfull and honest commands, and he may honest commands; and yet not honestly.

2. It is said that Jurator Assident dampna, and it is not said occasione transgression. predict. and it is against all Presidents: But Nota, that there were these words, ex hac parte opposita, and therefore the exceptions were disallowed by the Court, and the first Judgement affirmed.

The same Term in the same Court.

Secheverel versus Dale.

This Case was sent out of Chancery to this Court to know the Law therein, and in Trespas the case was this: Henry Secheverell, the Father seised in Fee, levied a fine to A. and B. in Fee, to the use of himselfe for life, absque impetitione vasti, with power to cut and carry away the trees, and to make Leases for 21 yeares, or three lives, the remainder to the use of John Secheverell his eldest Son for life, without impeachment of waste, with the same powers.

Henry the Father made a Lease to one (under whom the Plaintiff claims) for three lives, rendring the ancient Rent, excepting all the trees (unlesse those which shall be for cropping, lopping, and fell) Henry the Father dyes, John the Son in the next remainder cut certain trees Victorin, Secheverell who claims by the lease made by the Father, brings trespass, and two Questions were moved.

1. Whether Lessee for life without impeachment of waste, may make a Lease excepting the trees, and it was objected by the Council of the Plaintiff, that he could not because this second Lease ariseth out of the first fine, and out of the estate of the Conusor: But the Court prima facie, was of opinion that he might well make such a Lease with such an exception, See Co. lib. 11. Lewys Bowls his Case, and Doctor and Student lib. 1. cap. 1. and by Doderidge Justice, the Lease ariseth out of both the estates. Jones Justice, suppose the Lessee absq; impetitione vasti, assigne over all his estate, might he cut the trees? and it was conceived that he might, for by Doderidge he hath power to dispose of the trees, as it was resolved in Lewys Bowls his case. Jones, he hath no propriety in the Trees, untill they be cut, Crew: ch: Justice, Admit a Stranger cut the trees, who shall have them? By all the Court the Lessee without impeachment of waste shall have them.

D o d

2. Point,

2. Point, Tenant for life without impeachment of waste, with power to cut and carry away the trees, and make Leases for 21. years or three lives, the remainder for life to J. S. without impeachment of waste, &c. Tenant for life makes a Lease for three lives, and dyes, whether he in remainder for life, without impeachment of waste, with power to cut the trees, may cut the trees, and take them during the Lease for three lives, and the Court seemed to be of opinion that he might: And Leving of Council with the Plaintiff, argued, that when tenant for life without impeachment of waste with power to cut the trees, and to make Leases for 21. years or three lives, makes a Lease for three lives, excepting the trees, that this is a void exception, because he hath no interest, but a bare Authority, 27. H. 6. Fitz. Wast. 8. Statham tit. Wast. 1. makes this a Quære (which Statham was once the owner of the Land in question.) A man makes a Lease for life without impeachment of waste, a Stranger cuts trees, the Lessee brings trespass, he shall recover no Damages for the value of the trees, because the propriety belongs to him in the reversion, & he may dispose of them, Quære Dyer 284. Daunsley and Southwells Case, Co. lib. 11. Lewys Bowles case, that such a Lessee may take trees which are blown down, and 3. H. 6. 45. Mich. 41. and 42. Eliz. C. B. Leechford against Sanders in an Action of waste upon a Lease made to Sanders for life, with a proviso that the Plaintiff might dispose of the trees during the estate, and resolved that the Action lies not, for notwithstanding this power, the trees are demised to the Lessee also, so here when the trees are excepted, he hath no interest, but only an authority.

2. The exception is void for another reason, because when such a Lessee, makes such a Lease, this is not his Lease, but it hath its operation out of the original fine, and he who makes this hath but the nomination, and therefore cannot add a condition or exception to it. And if the second Lease shall have its being out of the estate of the Lessee for life, then there shall be an use upon an use, as appears Co. lib. 1. 134. and that the Law will not allow. 15. H. 7. and Co. Lib. 1. Albany's Case, If a man devise, that his Executors shall sell his Land, they cannot add a condition or exception to this sale, as an attornment upon a condition subsequent is void, Co. lib. 2. Footers case.

3. This case may be resembled to the case of Copy-holds, which is in Co. lib. 8. 63. b. in Swaynes Case: If a Lord takes a Wife, and afterwards grants Lands by Copy, according to the custome, and dyes, his Wife shall not be endowed of this Land, for albeit her title of Dower was before the Grant, yet the title of Copyhold (which is the custome) is elder then the title of Dower; so in our case, the title of the second Lessee is derived out of the estate of the Conuzers, and therefore shall not be clogg'd with the Exceptions of Lessee for life, without impeachment of waste.

4. This privilege to cut the trees is annexed to the estates, and goes along with the estate, and therefore shall not begin before the Stranger be in possession, 3. E. 3. 44. 45. Idles case 28. H. 8. Dyer 10. And it may be resembled to the cases of 16. E. 4. and 27. H. 8. Tenant in tail sold the trees, if he dyes before the Party takes them, he shall never have them, because he hath stay'd out his time. But it may be objected that upon such a Lease he may reserve a rent, as it is in Whitlocks case Co. lib. 8. to which I will offer this difference, Lessee for life, with power to make Leases for three lives, reserving rent makes a Lease for three lives, reserving rent, this reservation is good, because it is but a Declaration of the Lease, and of the rent; but if there were no such clause of reserving rent, then I conceive it were otherwise.

But admitting all this were against me, yet the justification of the Defendant is not good, for by the exception out of the exception, the Lessee cannot

cannot take the benefit of the bodies of the trees, because he will thereby deprive the Lessee of the croppings and loppings &c. as in 28. H. 8. Dyer Malverell and Spynkes case. Mylward of Lincolnes Inne for the Defendant. And first he conceived that the Lessee for life without impeachment of waste, might dispose of the trees in the same manner as Tenant in fee might doe, with this difference, that the disposall thereof ought to be in his life time, and so it is resolved in Lewys Bowles case Co. lib. 11. 46.

2. The second matter in the case is, whether the Lessee for life, without impeachment of waste &c. hath only an authority, or an interest in the trees, and I conceive that he hath an interest, for his power is to make Leases of it, or of any part for 21. years or 3. lives, and that the Conuzors shall be seized to the use of such Lessees, now when he makes a Lease excepting the trees, the trees are not demised, so that he remains still tenant for life, without impeachment of waste for the trees.

3. Excepting all Timber-trees, but for fencing, cropping, and lopping; it hath bene objected that this exception hath no forme: It is a generall rule, that if a man makes a Grant, and in the close thereof except all that which was granted before, the exception is voyd: and this appears by 34. Ass. Pl. 11. A Will was granted salvo stagno molendini: so here the last exception takes away all that which was granted before, 38. H. 6. 38. in a Quare impedit 28. H. 8. Dyer 19. by Mountague, the cropping and lopping of trees belong to the Lessee, like to the Duke of Norfolks case in 12. H. 7. 25. and 13. H. 7. 13. and 18. E. 4. 14. and albeit every grant shall be taken most strongly against the Grantor, yet it shall have a reasonable intendment for the benefit of the Grantor, and this appears by 7. E. 4. 22. 17. E. 3. 7. 9. E. 4. 2. 21. E. 3. 43. so here the Exception shall have a reasonable intendment, that he shall onely have such loppings and croppings as shall be bestowed upon the Park, and no other. Doderidge Justice, I conceive that by the words without impeachment of waste, he hath interest in the trees as long as the estate continues.

2. That when he makes a lease by the second power given to him, this is derived out of the Fine, and shall be good against him in the remainder.

3. Because he hath power to dispose of the trees, I conceive, that when he makes a Lease, excepting the trees, this is a good exception, 24. Eliz. C. B. A man made a Lease for years, now he hath the waste of the trees, if he assign over his estate excepting the trees, the exception is voyd, but in our case the Lessee hath not parted with his whole estate.

4. So the sole question is, whether he in remainder may cut the trees during the estate of three lives made by Henry Secheverell, and he conceived that he might, and so concluded for the Defendant: Jones Justice agreed, that the Lessee for life without impeachment of waste, hath interest in the trees, but this interest is concomitant with his estate and determinable with it.

2. I conceive that the exception is good. Such things which a man hath by the Law he cannot resign to himselfe upon his assignment, as the cropping and lopping of trees, as if tenant in taile after possibility &c. (who is dishabable of waste by freedome of the Law) assign over his estate, reserving the trees, he cannot cut the trees, but here the Lessee hath a larger liberty then the Law gives to him, and he by vertue of this may give away the trees; but I conceive that if he had assigned over all his estate, then he could not have excepted the trees, but here he hath not granted over all his estate, for he hath a remainder, and may have an estate in possession afterwards, and upon this Lease for three lives hee may reserve a rent to himselfe.

3. I conceive, that this Lease is derived partly out of his owne estate, and hee hath not the meere nomination, and partly out of the first Fine, and therefore such Lessees shall be subject to all charges made by the Tenant for life who made the Lease, as Statutes, Recognizances, &c. to wit, during the life of the first tenant for life.

4. When he dyes who made the said Lease for three lives, whether he in remainder may cut the Trees during the said Lease, and he conceived (yet not without some doubt) that he had no power during the lives of the said Lessees. Whitlock Justice agreed with the rest, so that it was agreed by all:

1. That it is a good exception.

2. That the second lease is drawn out of the Fine: And the question now is, whether he in remainder without impeachment of waste with power to cut the trees, hath power to cut them, during the lives of the said three Lessees, and the Councell was commanded to speake to this point only upon another day.

The same Term in the same Court.

Foster and Taylers Case.

Erroꝝ was brought upon a Judgement given in C. B. and after the Record was certified into this Court, the Common-pleas amended a rasure of the Record which was there, and now Bramston Sergeant moved for the Def. that the Record might be amended here: Jones Justice, I doubt whether an Inferiour Court can amend after the Record is certified here, for then it is but a piece of Parchment with them: Bramston, It is resolved that it may in Blackmores case, Co. lib. 8. Doderidge, the doubt is, whether it may be amended after erroꝝ assigned in the same Court, for this takes away the benefit of the Law from the Plaintiff in the Writ of erroꝝ. Jones, at another day said, that if in nullo est erratum had been pleaded, it could not have been amended.

And as it is, it cannot be amended, because now it is assigned for erroꝝ; and the Plaintiff was once intitled to his Writ of erroꝝ, which shall not be taken away from him afterwards: and in 11. Jac. there was such a case moved by Yelverton the Kings Solicitoꝝ, and agreed that it could not be amended.

And Pasch. 17. Jac. one Abbingtons case upon a rasure, as our case is, & it was doubted whether it could be amended: and by Broom Secondary in the said case, it was amended, Doderidge in this case, it may be amended, albeit it be after erroꝝ brought, because it is only the erroꝝ of the Clerk, and it is amendable, although the erroꝝ be assigned in the same point, and so was the opinion of the whole Court, and therefore it was amended.

The same Terme in the same Court.

Weld of the Inner Temple moved for a Prohibition to the Ecclesiasticall Court at Worcester, and shewed for cause. 1. That the suit there was for money, which by the assent of the greater part of the Parishioners of D. was assessed upon the Plaintiffe for the reparations of the Church, to wit, for the recasting of their Bels, the truth is that the charge was for the making of new Bels, where there were four before, whereby it appears that it is meerly matter of curiosity, and not of necessity, for which Parishioners shall not be liable to such taxations, and he relied upon. 44 E. 3. 19. by *Finchden*. 2 The party there is overcharged, of which the Common Law shall Judge. 3 The Party hath alledged a Custome that he and all those who hath an estate in such a Tenement, have used to pay but 11 s. for any reparation of the Church. But the Prohibition was denied; and by *Doderidge* in the Book of 44 E. 3. there was a By-law in the case to distrain, which is a thing meerly temporal, for which the Prohibition was granted & *per Curiam*, in this case the assessment by the major part of the Parishioners binds the party; albeit he assented not to it: and the Court seemed to be of Opinion that the Custome was not reasonable, because it laid a burthen upon the rest of the Parish. *Littleton* of Counsell of the other side, suppose the Church falls shall he pay but 11 s. *Whitlock*, If the Church falls, the Parishioners are not bound to build it up again, which was not denied by Justice *Jones*,

The same Term in the same Court.

A Prohibition was prayed, because a person had libelled in the Ecclesiasticall Court for the tenth part of a bargain of Sheep, which had depastured in the Parish from Michaelmas to Lady day: and the party surmised that he would pay the tenth of the Wooll of them, according to the custome of the Parish. But the Prohibition was denyed, for as *Doderidge* Justice sayd, by this way the person shall bee defrauded of all, if he shall not have his recompence, for now the Sheep are gone to another Parish, and he cannot have any Wooll at this time, because it was not the time of sheering. Nota, per *Whitlock*, de animalibus, inutilibus, the Person shall have the tenth part of the bargain for depasturing, as Horses, Oxen, &c. but de Animalibus Utilibus, he shall have the Tith in specie, as Cowes, Sheep, &c.

The same Term in the same Court.

Upon an Issue joyned in an Ejectione firmæ, it was found for the Plaintiff, and *Lewknor* moved in arrest, &c. because the Ejectione firmæ was de Messuagio five Tenemento, which is not good for the incertainty, and so it was resolved 12. Jac. in this Court, and Ejectione firmæ lies not, De Tenemento Co. lib. 11. 54. *Savils case*, And it was resolved in the Exchequer chamber, that it lies not de pecia terræ; and in this Court in *Rhetorick* and *Chappels Case* it was resolved that it lies not De Mess. & Tenemento.

The same Term in the same Court.

Sir Robert Browne *against* Sir Robert Stroud.

In debt upon an Obligation for performance of certain Covenants contained in certain Indentures made between the Parties aforesaid, and the Covenant upon which the question did arise was this: R. B. being seized of the Mannor of Dale, & S. R. S. of the Mannor of Sale, they exchanged the one for the other, and the Mannor of R. B. being more worth then the Mannor of R. S. R. S. covenanted to pay for the said Mannor 1200 l. and no time was limited when the money should be paid, and the money not being paid within a year after, R. B. bargained and sold the said Mannor by Deed indented, and inrolled to J. S. and his Heirs, and afterwards brought an Action of Debt against the said R. S. for the said 1200 l. who pleaded this matter in Bar, and Jeremy argued for the Plaintiff, that this Plea shall not discharge the Defendant of the said Covenant, for it is a reciprocal covenant, and he ought to sue the other Party for the breach of the covenant; and it is a perfect bargain Dyer 30. 14. H. 8. 9. and here the Agreement is in writing, and it is good, albeit there be no limitation when the money shall be paid, 37. H. 6. 9. Calthrop for the Defendant, that the Action could not lie, for the contract is Executory, and therefore is not to pay the money till he hath the Mannor, for the Covenant is that pro Maner. &c. he should pay him 1200 l. and the word [pro] implies a condition and consideration, and being executory on the one part, shall be also executory on the other part, 9. E. 4. 20. 21. Abridg. in Plowden 134. in Browning and Bestons case 15. E. 4. 4. If A. grant to B. all the ancient Dale, and for them B. grants, that he will make new Dale for A. if B. cannot have the old Dale, he shall be excused from making the new Dale, for he cannot have the one without doing the other, 6. E. 6. Dyer 75. The contract was. pro 20. which makes a condition, 15. H. 7. 10. by Fineaux, If a man covenant with me to serve me for a yeare, and I covenant to give him 10 l. he shall have an Action for the 10 l. although hee do not serve me, otherwise if I covenant to give him 10 l. for his service.

Also there is no time limited when the payment shall be made: true it is, that in Co. lib. 6. 30. when the act to be done is a transitory act, and no time is limited there, it ought to be done in convenient time, but the Law shall judge of the convenientcy of this time, and the Law will never judge the time of payment to be before he hath the Mannor, pro quo, &c.

In many cases when no time is limited, the Law will appoint a time, as appeareth in 33. H. 6. 48. and Perkins 799. But now in our case the Law will never appoint that this money shall be paid, because the other party hath disabled himselfe to perform his part; like to Sir Anthony Maines case Co. lib. 5. 21. Doderidge, The bargain is not perfect, because no day of payment is limited, and the other shall have no Action of Debt for the money before he hath the Mannor. Jones, If I covenant to make a Feoffment to J. S. and he covenant in consideration of that Covenant to pay me 10 l. he shall have an Action of Debt against me, before he hath made the Feoffment.

And at another day in Trinity Term. 3. Car. Noy argued for the Plaintiff, and opened the case thus: Amongst other Covenants in certain Indentures between them it was agreed, that whereas Sir R. Brown the Father was seized of the Mannor of Gadmaston, with the Abbowlson appendent, & Sir R. Stroud of the Mannor of D, within the same County, that there should be an exchange between them

them of the said Mannors, & because the Mannor of Gadmaſton was the better, Stroud covenanted with the Father and the Son to pay 1200 l. to the Father for the Demefnes of the ſaid Mannor and Advowſon, and that at Michaelmas next inſuing, there ſhould be a mutuall entry into the ſaid Mannors, and that in the mean time either of them ſhould take the profits of their own Mannors, and that they ſhould deliver each to other their evidences, and that Affurances ſhould be made as Council ſhould adviſe; the Plaintiff declare, that they had performed all the Covenants which were to be performed on their part, and that the Defendant had not paid the 1200 l. and that thereupon this action of Covenant was brought.

The Defendant proteſtando that the Plaintiff had performed the Covenants, and had not produced their evidences, &c. for Plea ſaith, that the Plaintiff after Michaelmas bargained and ſold the Mannor of Gadmaſton to J. S. and his Heirs, upon which the Plaintiff demurs, and he conceived that notwithstanding the ſale after Mich. yet an action of Covenant lies for the 1200 l. but otherwiſe it had been if he had ſold it beſore Mich. But it hath been objected that the money by the Covenant is to be payd pro the Mannor, and therfore becauſe the Defendant cannot have the Mannor, he ſhall not pay the Money, and for this 9. E. 4. 20. and 24. E. 3. 21. have been cited, that [pro] implies a condition, as pro ſervitio pro maritagio, but theſe Caſes do not reſemble this caſe in reaſon, becauſe the ſact to be done here, reſts upon an indiffinite time, and the Defendant is to do the firſt Act, & the Defendant is bound to a certain time for the doing of this Act. For the firſt it is agreed, that the Defendant ſhall pay 1200 l. and the Plaintiff agrees to make Affurances for this Mannor, and that the Affurances ſhould be made as Council ſhould deviſe, and I conceive that the Defendant ought to procure the Council to deviſe, for mutuall Affurances ought to be made, and either party ought to appoint what Affurances he would have, and the one ought not to be a Carver to the other, neither can one know what council the other will have, and upon this reaſon is the caſe, 9. E. 4. 3. 4. and Plow. 15. b. the Caſe of the Bell, it ſhall be weighed by him who is to have the profit, peradventure if it were in caſe of an Obligation to perform covenants, there he ought to procure the Council, for ſaving the penalty of the obligation; but it is otherwiſe here in caſe of a Covenant, Co. lib. 5. 22. b. 18. E. 3. 27. and 4. E. 3. 29. If a man be bound to be ready to levy a fine ſuch a day, yet the other ought to bring the Writ of Covenant againſt him beſore that day, for otherwiſe he cannot levy a fine;

But now the Law is altered, for now fines are levied, & Writs of Covenant are ſued out afterwards, 17. E. 4. 2. per Pigot: If I am bound to you in 20 l. to enfeoff you at ſuch a day of ſuch Land, if you pleaſe to take the Feoffment, you are bound to let me know your pleaſure, and here the Affurance is for the benefit of the Defendant, and he cited Co. lib. 5. 23. and 7. E. 4. 13.

2. For the time, this Affurance ought to be deviſed by Council beſore Mich. or otherwiſe the Plaintiff ſhall be enforced to keep his Mannor all his life, and ſhall be hindered of the ſale of it for payment of his debts, or other neceſſaries whatſoever. And 17. E. 3. 1. liking ought to be ſhown in convenient time: And it appears by the Articles that the time intended was beſore Michaelmas, for every thing to be done by the Articles, was to be done beſore Michaelmas, Hill. 37. Eliz. Rot. 99. B. R. between Mills and Parſons: A man covenanted in conſideration of 42 l. rent to be granted to him, payable at Mich. and Lady day, yearly, to levy a fine of a Mannor to the uſe of &c. and the affurance of the Rent is not made beſore Michaelmas, and it was reſolved that the Covenant was not performed, for the grant of the Rent ought to be beſore Mich. for otherwiſe he could not have the benefit intended, and cited alſo Dyer 347. and 20 Eliz. Dyer 361. and in this caſe there could be

no execution of other Articles if the Council did not devise them before Mich.

But it hath been objected that the Plaintiff have not fully shewn the performance of the Covenants of their part, but only by implication, albeit they have performed, and they have not averred that the Defendant hath not devised.

Answ. To which I answer, that this is good enough; but where I covenant to do an act upon a future contingent act to be done by another, there I ought to shew it particularly, but otherwise in this Case, and this is for the benefit of the Defendant, and therefore he ought to shew it, and to this purpose is 3. E. 3, Fitz. Det. 157. and 18, E. 3. 4. &c. Jones Justice, Suppose the Defendant had demanded the assurance after Mich: and before the sale what shall be done: Noy, nothing can be done after Michaelmas: and it was adjourned.

The same Term in the same Court.

Sanders and others, versus Meryton.

IN an Action of Covenant the case was this, Amongst other Covenants in a certain Indenture made between Sanders and others to the Lessors, and his two Lessors, the Lessors covenant to discharge them of all Incumbrances done by them or any other person, and the Plaintiff assign for breach, that one of the Lessors had made a Lease, and thereupon they brought this Action. And Goldsmith moved in arrest of Judgement, that the breach was not well layd, because it is onely layd to be done by one of them, and the Covenant is to discharge them of incumbrances done by them, which shall be intended joyned incumbrances. Doderidge Justice, the Covenant goes aswell to Incumbrances done severally as joyned, for it is of all incumbrances done by them or any other person, and so was the opinion of the other Justices, and therefore the exception was overruled.

The same Term in the same Court.

Dickar versus Moland.

IN Replevin, the case was thus: A man made a Feoffment to the use of himselfe for life, the remainder to his Son in taile, which remainder over to the Defendant made conuſance as Bayliff to the Son for 4 s. Rent due to him before the sayd time, in which, &c. to wit, 1. Jan. 18. Jac. which time was before the death of the Feoffor, whereupon it was moved for the Plaintiff, that the Avowry could not be good, and Roll argued for the Defendant, that it is good enough, for the *Ante predictum tempus quo* &c. is good enough, and the (*scilicet*) is voyd, for by this it appears that the Rent is due to another 20. H. 6. 15. And a (*scilicet*) is but an Exposition of that which is once before, and it shall not destroy the precedent matter, but if it be contrary to it, it is voyd, Co. lib. 5. Knights case, A *scilicet* shall not make an alteration

alteration of that which went before, 15. Jac. B. R. *Desmond and Johnsons* Case. In a Trover and Conversion the Plaintiff declared that he was possessed of the said goods. 1 Jan. 15. Jac. and that *Postea*, *scil.* the first day of May hee in the yeare aforesaid lost them, and that they came to the hands of the Defendant, and upon issue joyned, it was found for the Plaintiff, and this was moved in arrest of Judgement, and by the Court the (*scil.*) was agreed to be void, and the *Postea* good; and the like case was 17. Jac. in Debt. The second Question is, a man makes Conusance for Rent for him in remainder in taile, and does not alledge the precise time when the Lessee for life died, but onely that he died, and I conceive that it is well enough.

1. Because an Avowry (which is in lieu of an action) is a reall action, and in reall actions no precise day need to be alledged.

2. Because he avows for 4 s. rent due, and the arreare to the remainder, which implies that the Lessee for life is dead; See 14. *Eliz. Dyer*. The case of a person, in one *Arundalls* case; a man was Lessee for ninty years, if the Lady *Morley* should so long live, in an action brought by him as Lessee for years in his Declaration he did not averre that the Lady *Morley* was alive, and yet awarded good, *Trin.* 12. Jac. in *Hord and Paramores* case, the defendant avowed as Heir of Sir *John Arundell*, and alledged no time incertaine of the death of Sir *John Arundell*, and yet awarded good for the reason aforesaid, and therefore he prayed Judgment for the Avowant.

The same Terme in the same Court.

Jenkin versus Vivian.

In trespass, Jermey for the Plaintiff took some exceptions to the Plea of the Defendant: 1. That the Defendant claim common in *Tridgemore Hooze* *ratione Vicinagii*, and doth not say, a tempore cujus contrarium memoria hominum non existit. 2. The Defendant alledgeth that he and all his Occupiers of *Down-close* had used to have common in the said *Tridgemore Hooze* &c. whereas he ought to have shewn what estate they had in *Down-close* who have used to have this comon: *Rol.* there need no prescription in this case, no more then in a comon appendant (which case of a comon appendant was agreed by the whole Court) for it is mirt. 6. E. 4. 55. Co. lib. Intr. 625. tit. trespass. For the 2. exception, I agree that if it be by way of prescription, then it is not good, as it is alledged here, but if it be by way of custome (as here it is) then it is good, for a custome goes to Land, and a Prescription to persons, *Hill.* 11. Jac. *Higgs* brought an Action upon the Case for erecting of a new Hill, and alledged a Custome, that he and all the Inhabitants &c. an exception was taken to it, and it was there ruled that it was good, because alledged by way of custome: Co. lib. 6. Gatewards case, and also *Mich.* 14. Jac. it may be alledged by way of custome, as our case is, and 15. E. 4. when it is by way of discharge, it may be alledged in all Occupiers. Jermey for the Plaintiff, It cannot be a custome here, for as it is in 23. *Eliz. Dyer*, A custome cannot extend to a particular place, and this was agreed by the whole Court: But there is another exception, he claims common in *Tridgemore Hooze* for cattle levant and couchant in *Down-close*, and does not aver, that these beasts were levant and couchant upon *Down-close*, and per totam Curiam, this ought to be averred, and it was also agreed that in this case he ought to have prescribed: But for the exception of all occupiers it was doubted: but for the other exceptions Judgment was given for the Plaintiff.

Intr. Hill. 1.
Car. Rot. 331.

The same Term in the same Court.

Chambers *Case*.

It was said in this case, that in debt upon a Recognizance acknowledged in Chancery, or in any other Court, the Defendant cannot demand Oyer of the condition, for the Recognizance is not in Court as an obligation is, when debt is brought upon it: But if Debt be brought upon a Recognizance acknowledged in this Court, then the Defendant may demand Oyer of the Recognizance.

The same Term in the same Court,

Harison *versus* Errington.

In Error to reverse an Inditement of rescous and Riot, taken in the County Palatine of Durham, Bankes assigned the Errors, whereof one was, there was a Warrant to three conjunctim, & divisim to arrest the sayd Harison, and two of them arrest him, and therefore the Arrest was not well done, for it ought to have been by one, or all three, and the reason is, because it is a ministeriall act, otherwise if it had been a judiciall act, 14. H. 4. 34.

2. The Inditement of Riot was against three, and the Jury found only one of them guilty of the Riot, this is a voyd verdict, for one alone cannot make a riot, like to the case in 11. H. 4. 2. Conspiracy against two, and only one of them is found guilty, it is voyd, for one alone cannot conspire. And at another day in the same Term Noy took other exceptions.

1. Because the Inditement is Jurator, pro Domino Rege presentant. &c. and doth not say, that 12. Jurors presentant, and peradventure but 11. did present.

2. The names of the Jurors ought to have been certified, for peradventure they are not probe & legales homines, but Villains and Outlawes, 15. H. 4. 41.

3. It is found that Rolson the Sheriff by vertue of a Writ directed to him, came, &c. and upon this rescous was made by Harison &c. and it doth not appear what manner of Writ it was, scilicet, Elegit: Capias ad satisfaciend. on &c. and if there were no Writ there can be no rescous, and albeit he had a Writ, yet if execution were done by vertue of another Writ which he had, the Party may disobey it, as if upon an habere facias seisinam, the Sheriff makes a Warrant as upon a Capias, the party is not bound to obey the Wap- lisse, if hee bee not a Waplisfe knowne; but in case it appears they were only Waplisfs pro hac Vice. Nota, that an Inditement before Coronors, which found that the Earl of B. was felo de se, was qualst, because it did not appear that it was per sacramentum probor. & legal. hominum: And in the case of Sarum, this Term an Inditement was qualst for the same cause.

The same Term in the same Court.

Rochester *versus* Rickhouse.

IN a writ of Error to reverse a Judgement given in *Ejectione firme* in Newcastle, Banks assigned these errors.

1. The Plaintiff declares of a Lease made *de Burg. sine Tent.* which is not good, no more then in *Ejectione firme de Mess. sine Tent.*
2. Because the Judgement is not *quod capitur* as it ought to be, because it is *vi & armis*.
3. The judgement is *Ideo concessum est*, where it ought to be *consideratus est*, and for these Errors the Judgement was reversed: And the same day another Judgement between Bell and Margery Strongury was reversed for the same causes.

The same Term in the same Court.

Petit *versus* Robinson.

IN Error to reverse a Judgment given in C. B. in a Replevin, there Jeremy for the Plaintiff assigned two Errors:

1. It appears, that after the Writ and before the trial, it was coram Justiciar. Dic. Domini Regis, and there was not any speech of any King but of King James before, and there is no speech of his demise, and therefore this shall be intended before the Justices of King James, which cannot be.
2. Because the Nisi prius is certified to be tried before Francisco Harvey, Mill. uno Justiciar. &c. & the Postea returned, is before Francisco Harvey Arm. argued, & so there was no such Judge of Nisi prius as Francis Harvey: Banks for the Defendant, I conceive the first errors to be because the adjournment was per br. Dom. Reg. and King James was named before, so that the objection may be, that it shall be intended the Writ of Adjournment of King James, which cannot be, but I conceive the Writ is generall, and shall not be intended, but it can be adjourned by the Kings Writ who was dead before, and the Clerk of the Assizes who certified it, is bound to take notice of the Kings death, 37. H. 6. 28. and also the Record is not per br. Dic. Dom. Regis, but per br. Domini Regis, generally. And for the second, I conceive it is no error, and if it be error, then if the Certificate be not according to the Copy, out of which the Clerke certifies, it shall be amended, 22. E. 4. 22. 35. H. 6. 23. b. Co. lib. 8. 136. Blackmores case, which is a stronger case then this. But it hath been objected, that the Record is certified by the Justices, and now there can be no abatement to the contrary; but I conceive that this Court may send to the Clerk of the Assizes to amend it, and those objections were over-ruled in C. B. in the same case. Doderidge Justice, I conceive that notwithstanding the exceptions the Judgement ought to be affirmed, for as to the first, the Court is bound to take notice of the demise of the King, and therefore it shall be intended the King that now is, and so the Writ of adjournment good enough, in Dyer. King Henry 8. made a Patent, and it was *Enricus Dei gratia*, &c. where it should be *Henricus*, and yet the Patent good; so in a Writ to the Bishop, the subscription is, *Episcop. Norw.* this is good enough, for the Bishop of Norwich is very well known. And for the other, I conceive it is not well alledged, because it is not shewne whether he were a Knight at the time of the Certificate or not, and so it may well stand together, that he was a Knight, for he might be an Esquire at the time of the trial, and before the

the Record certified might be made Knight, Jones Justice to the same intent, and that we ought to take notice of the Demure of the King, & therefore it shall be intended of the Writ of adjournment of the King which now is, and therefore it is no error, and yet if it were, it were amendable: Whitlock Justice agreed, and therefore the Judgement was affirmed by the whole Court.

The same Term in the same Court.

Crabbe and his Wife versus Tooker.

IN Covenant betweene *Walter Crabbe* and *Anne* his Wife, against *Tooker*, the covenant upon which the breach was layd, was this, *Tooker* the Defendant covenanted with *Tooker* his Son, and *Anne Slade* (one of the Plaintiffs, whom he intended to marry) to give them their meat and drink in his house, and if any discontent should happen between the Father and Son, so that he, and his Wife *Anne* should disagree to dwell with *Tooker* the Father, then they should have 6. Beasts gates, &c. *Tooker* the Son died, *Anne* disagree to dwell with *Tooker* the Father, and marries with *Crabbe*, who with his Wife *Anne* brings this Action, and *Taylor* argued for the Plaintiff that the Action lies, for albeit the Covenant be in the conjunctive (if they disagree) yet it shall have a disjunctive interpretation, as where a man covenant to levy a fine to one and his heirs, if he dies the Covenantor may levy a fine to his Heirs, and *Hill* and *Granges* case in *Plow*. Two Tenants in common grant a rent, this shall be taken for severall Rents, and *Co. lib. 5. Slingsbyes* case, also the Wife is party to this covenant, and she must either have remedy upon this covenant, after the death of her Husband, or not at all, for she cannot disagree in the life time of her Husband *per que*, &c.

And it was agreed on the other side, that there ought to be a dislike between all joyntly, the Father, the Son, and the Wife: and now one of them being dead, the covenant is discharged, like to the case put in *Brudenels* case, *Co. lib. 5.* If Administration be grant during the minority of 3 if one of them dies, the administration ceaseth, and 31. *Eliz. in C. B.* A Lease was made to three, and the Lessor grants to them to be dispunishable of Wast *quamdiu cohabitarent*, one of them dies, and it was resolved, that now they shall be liable to wast. Also the Bar is not *bone*, for it is pleaded that *Discordia orta fuit*, and doth not shew what manner of discord this was, and therefore not good; as 3 *H. 6.* In Annuity brought *Pro concilio*, &c. he ought to shew for what manner of Council it was: *Whitlock* Justice was of opinion for the Plaintiff, and that this Covenant extends to the Wife, and that upon equall construction, because it comes in place of the first Covenant, and this was intended for the benefit of the Wife, as well after the death of the Husband as before: *Jones* Justice was of the contrary opinion, and that the second covenant was a severall covenant from the first, and that the disagreement is to be made by all three joyntly, and that when one dies the Covenant is gone, 2. *Eliz. Dyer*, A man will that *A. B.* and *C.* his Feoffees shall sell his Land, *B.* dies, now the Authority is determined. The Lord *Gray* committed the custody of his Son to four, one of them dies, the authority is gone, and in this case there is no matter of interest, but an agreement, and in such a case as this is a Feme covert, hath a will, albeit she hath no legall will; but in this case there ought to be a disagreement of both, and there ought to be a dislike of the Father also, and in the Declaration it is also said, that she disagreed. *Doderidge* agreed with *Jones*, that the Declaration is not good, and that it is not warranted by the Covenant, and that the breach is not well assigned. The case is grounded upon the second covenant which consists upon a contingency which

which contingency is, if there happen any discord between the Father and the Son, &c. the words are joyn't, and all ought to disagree: True it is, that in some cases a conjunctive shall be taken for a disjunctive, but this is according to the matter and circumstances of the fact, but in our case it shall not be taken disjunctively. If the Father, the Son, and the Wife had disagreed, then it is cleer that an Action of covenant lies, but this is *casus omissus*, and no provision for it. Also it is only alledged in the Declaration, that she disagreed, whereas a mutuall disagreement between all ought to be alledged, and therefore Judgement was given *Quod quarens mil. capiat per bellam*. But all agreed, that the Wife might have boarded with Tooker the Father, if she would, but her new Hushand could not.

AT howe Sergeant took divers exceptions to an Inditement of forcible entry upon the Stat. of 8. H. 6. against Ployden and others for expelling one Syms from his Copt-hold, and the principall exception was, because (disseisivit) was not in the Inditement, and in truth it cannot, for albeit the Stat. of 21. Jac. cap. 15. gives power to Judges and Justices of Peace to give restitution of possession to Tenants for yeares, and Copt-holders, in which there shall be an entry, or detainer by force, yet the Stat. does not give an Inditement of forcible entry of copt-hold. Noy, a Copt-holder shall now have an Inditement of forcible entry, but (disseisivit) shall not be in it, for no Jury will find that because it is not possible, because a Copt-holder hath no free-hold, and yet a Copt-holder shall have a Plaint in nature of an Assize against a stranger, but not against the Lord: And at last the opinion of the Court was, that the Inditement was good.

UPON a Capias directed to the Sheriff of London to take the body of J. S. the Capias was returnable die Jovis, which was the day of All-souls, and thereupon the Sheriff took the party, but he returned, that because the return of the Writ was upon a day that was not Dies Juridicus, he suffered the party to go at large: And the return was holden insufficient, for by Doderidge the Writ was good, and the taking and detaining of the party by vertue thereof was lawfull, but yet he could not have the party there at the sayd day, and therefore the Sheriff was compelled to bring the party into Court, which the same day he did accordingly.

The same Term in the same Court.

AMan granted a Rent charge of 12 l. to one of his Sons out of the Manors of D. by Deed, and died, the Grantor lost his Deed, the Land is extended to I. D. by vertue of a Recognizance acknowledged by the eldest Son of the Grantor, the Grantor sue for his Annuity before the Councell of York to be relieved in equity, for that in respect of the losse of the Deed he could not have remedy at the common-Law, and J. D. the Conuzor obtained a prohibition out of this Court upon this surmise, that although the Councell of York should make a Decree, that he should pay the said Annuity, yet it should be no discharge for so much against the Conuzor, because their Decree was no legall eviction. Now came Smith of the Temple, and prayed a Precedendo for the Grantor to the Councell of York, and the opinion of the whole Court was, that a Decree, there being no legall eviction, shall not be a discharge for so much against the Conuzor. Doderidge, the Grantor of the Rent-charge, having now lost his Deed can have

no remedy in equity, for in this case *Equitas sequitur legem*, and of the same opinion were Jones and Whitlock: but by Doderidge (which was not denied) if the Grantee had lost the Deed by a casual loss, as by fire &c. in such a case he shall have remedy in equity: and he says, that in the beginning of King James, when Egerton was Lord Chancellor, there was such a Case in Chancery: A Grantee of a rent-sock had seisen of it, so that he might have an assize, and he devised it to J. S. the Devisee sued in Chancery to have his Rent and seizen of it, and he could have no remedy for it in Chancery: And this was one Malleryes case.

The same Term in the same Court.

Of the Hebborne was indited for stopping a way, &c. and it was moved that the inditement was insufficient, because it is not layd that it was *communis via*, but only that it was a way to the Church, and *per Curiam*, it was good enough, and by Jones Justice the Inditement is good enough, although there wants *vi & armis*, because he who is supposed to stop the way, is owner of the Land.

The same Term in the same Court.

AN Action upon the Case, upon a promise was brought in the Town of Northampton, and the Consideration alledged was, that if the Defendant here in the Writ of Errour, would discharge *Bagnot* of Execution, &c. that then the Plaintiff here in this Writ of Errour promised to pay him eleven pounds, and there the Defendant pleaded, *quod exoneravit illum de Executione relaxavit*, And *Bolstred*, for the Plaintiffe moved this for Errours, that the Plaintiffe in the inferiour Court did not shew by what manner of release it was, nor that it was by writing; for this being the Consideration upon which the Action is grounded, ought to be put in certain, *Mich. 15. lac. Staple and King*, Execution of a consideration ought to be shown, 35 *H. 6. 19.* a discharge ought to be shown in certain, 22 *E. 4. 43.* the Lord *Lisles* Case, and *Mich. 16. lac.* in this Court *Liverel* and *Rivets* Case (which was entred, *Trin. 16. lac. Rot. 322*) in an Action upon the Case, upon a promise upon issue joyned, it was found for the Plaintiffe, and it was moved in arrest of Judgement, because the Consideration was, that the Plaintiffe should discharge one *Ogle*, and he declares, that he did discharge him, and thereupon he brought this Action, and because he declared but generally, *quod exoneravit*, the Judgement for that very cause was stayed, and 36 *Eliz.* one covenanted to make an assurance, and pleaded generally that he had assured, and resolved that it was not good, and in *Rosse* and *Harvies* Case this Term (which was entred, *Trin. 2 Car. Rot. 1408.*) In Covenant the Defendant covenanted to give security, the Defendant pleaded that he offered security, and resolved that it was not good, *per que &c. Jermyn* for the Defendant, that the plea is good enough, for a Release by *Peroll* is sufficient, I will remember but one book, upon which I will rely, 27. *H. 8. 24.* *Jordons* Case, in an Action upon the Case, the Defendant assumed to the Plaintiffe, that if the Plaintiffe would discharge *I. T.* of such an Execution in which he is bound at the suit of the Plaintiffe, then if *I. T.* did not satisfie the Plaintiffe by such a day, the Defendant would do it, and they were at Issue upon an *Assumpsit*, and there the Count is admitted good, and he need not plead it was by writing, because the

the Discharge is good without writing, but it hath been resolved, that if a man be in execution at my suit, and I go to the Sheriffe and command him to discharge the Party, this is a good Discharge, although it be by *Peroll, Jones*. If I say to the Sheriff, suffer the party to go at large, this is a good release both to the party and to the Sheriffe, and by him (*relaxavit*) implies a sufficient release, and therefore the Plaintiff in the Writ of Error shall be barred. And if a man be bound to save one harmlesse in an Action brought upon this obligation, he pleads that he hath saved him harmlesse, and shews not how, the Plaintiff demurres generally, he shall not now take advantage of it, *Doderidge*. The Cases put by *Bolstred* are not to this purpose, for all those cases are of things incertaine, and he agreed that a release by perol was sufficient, and the case of 22. H. 8. is a stronger case then this is. *Whitlock* agreed also, and therefore *Doderidge* advised the Plaintiff to be satisfied, or otherwise they would affirm the first Judgement.

Trin 2. Car. in the Kings Bench.

Caryes Case.

J^s Caryes case of Grayes Inn: (where these words were adjudged actionable, You a Councillor? a Foole, an Ass, a Hangman, a Councillor of Law, a Foole in the Profession) it was said by Jones Justice, it was not sufficient to say, that he was eruditus in Lege, but he ought to say that he was Homo Conciliarius: and he said that in maintainance against Boughton, it came in question upon evidence to a Jury whether one who is a Barrister may give advice, and it was ruled that he could not, albeit he had Letters Patents to enable him as fully as if he had been called to the Bar: and in Fleetwoods case adjudged, that these words (You the Kings Receiver? you are his Deceiver, are you not?) were actionable.

The same Term in the same Court.

S^r Tho. Savill was indited for breach of the peace within the Pallace, to wit, for assaulting Sir Fran: Wortley, and he pleaded his pardon, and *Doderidge* said, that to strike in the place was the losse of the right hand by the Law, and in this point our Law agrees with the Lawes of France and Spain, and all other Nations, for as the person of the King, so his Palace and courts of Justice are so sacred, that such contempts and affronts are judged worthy of such punishments, and said that the Book of 24. E. 3. 33. Fitzherbert Forfeiture, 22. (of which he would have Students to take notice) is that where one came into the Palace armed, and being brought to the Barre in his compleat armor, the cause was demanded, and he said that it was in his own defence, being in fear of a great man then in Court, and he was committed to Prison by the Court during the Kings pleasure, and his Lands forfeited during his life. Vide for the like matter, 41. E. 3. Fitzh. Coron. 280. Dyer 188, 22. E. 3. 13.

Hillar. 2. Car. in the Kings Bench.

Oppe Mathias Wheelhorse was indicted at the Sessions of the Peace, holden in the Town of Northampton, quia Noctivagus, and because he divers dayes and nights did frequent the house of &c. which was within the liberties of Southampton, and was a suspected Bawdy-house: and Crawley Sergeant moved that this Inditement was insufficient for three reasons.

1. Because it does not appeare in the Inditement, that the party knew this to be a Bawdy-house.

2. Because it is not said that it was a Bawdy-house, but that it was suspected to be a Bawdy-house.

3. Because the Inditement is before Justices of Peace, Villæ de Northampt. and the house is infra libertates Villæ de Northampt. and it shall not be intended that the power of the Justices of Peace extend thither, and for it see Co. lib 5. 120. Longs case. 13. H.7. 33. 34. 22. H.7. Kelleway 89. Co. lib. 9. Mackaleys case: And the Court gave no opinion concerning the exceptions: But another thing was moved, to wit, that one could not be indicted before Justices of peace for being Noctivagus, but this is to be inquired of in the Leet, and in this the whole Court was against him, for it is a misdemeanor, and it is contrary to the Statute of Winchester, and every one may arrest him: And at another day he moved this last exception again, and sayd that the Justices of Peace have no power to fine men that are noctivagant, yet true it is, that a Court Leet hath such a power, Rastol. Leet 2. and true it is also, (as it is in 4.H.7. 12.) that every one may arrest a Night-walker, but there it is said that if he appeareth to be a man of good fame, the party who arrests him ought to let him go at large; and the Inditement here is only that he was Noctivagus, & it appears not that he is a suspicious Night-walker: & by Doderidge & Whitlock Justices (only present) by the Common Law every man may arrest him who is Noctivagus, and the word (Noctivagus) implies that he was a common Night-walker, and they sayd that Justices of peace by their Commission have power to take such Inditements, for it is of ill behaviour, and albeit the Inditement were nought for the other exceptions, yet being good in this, it shall not be quashed, and therefore Judgement was given upon it, and the party fined 40 s.

The same Term in the same Court.

Sparrow *versus* Sherwood.

In Trover and Conversion of two loads of Fitches of certain Land &c. The Defendant justifie by the command of Hare, to whom part of the Land belongs; and to one Pors, to whom another part in right of the Lady his Wife belongs, and shews that part of the Fitches did grow upon the Land of one, and part upon the Land of the other, and upon this the Plaintiff demurs:

1. Because he justifies by the command of two generally, and he cannot justifie upon the Land of the one by the command of the other, and therefore he ought to have alledged severall commands.

2. Because he does not shew particularly upon whose Land the Fitches grew, but that part grew upon the Land of one, and part upon the Land of the other, which is incertain.

3. Because

3. Because the Wife of Pors is called by the name of Lady, and the Wife of an Esquire cannot be a Lady: Doderidge and Whitlock onely present, for the first were of opinion, that it was good enough; for although it were a joynt command, yet the parties commanding having severall titles, it shall be taken as severall commands, *reddendo singula singulis*: and for the third it is good enough, being in a Plea, otherwise, if it had been in a Writ: But for the second Exception, the bar is not good enough, because uncertain, so that although upon other Exceptions moved by the Defendant, the Replication of the Plaintiff was not good, yet the Defendants Bar being ill, the Plaintiff shall have Judgement upon the Declaration: And the Plaintiff had Judgement accordingly.

The same Term in the same Court

Risley *versus* Hains.

IN an Action upon the Case, upon an *assumpsit*, the Plaintiffe declared upon the Sale of several parcells of Tobacco, to wit, for one parcell so much, for another parcell so much, and so forward, and in the Conclusion he saith, *qua quidem separales summa in toto se attingunt*, to 55.l. which (being computed) is lesse then the particulars, and upon *non assumpsit* it was found for the Plaintiffe, and now Andrewes moved in arrest of Judgement, for that the particulars, and the summing up of them differs, and this being in a Declaration (which ought to contain truth) it is not good, and so there appears to be no cause of action, 35.H.8. Dyer 55. And Grices Case, in the very point Mich. 17. Jac. in this Court, but by Jones and Whitlock Iustices onely present, the Declaration is good enough, for there is a particular promise for every parcell, and the summing up of particulars is only surplusage and officiousness of the Clark, therefore the Judgement was affirmed: And *nota*, that Jones said *obiter* in this Case, that upon a contract, the Party to whom payment is to be made, need not make request, and afterwards it was agreed by the whole Court, that it should be amended, otherwise it had been more.

The same Term in the same Court.

A Great multitude of Welshmen were Indited for the death of a man, by an Inquisition taken before the Coroner in the County of Mountgomery in Wales, and Littleton of Council with the Welshmen took some Exceptions to the Inquisition: as, 1. That the Coroner cannot take any Inquest, unlesse it be *super visum corporis*, and to this purpose he cited Britton, 6.Ric.2. Coron. 107. 21.E.4. 70. 2.Ric.3.2. This also is the reason that, if a man drown himselfe, and cannot be found, the Coroner cannot enquire of the death of this man: but for the King to have a forfeiture of his Goods, an Inquisition ought to be taken before the Iustices of Peace, as it was resolved in this Court, Trin. 13. Jac. upon which the first exception was, that the Inquisition was taken at D. in the time of King James, *super visum corporis*, in D. in the time of this King, and for this he cited two presidents out of Cookes Booke of Entries: Another Exception was, because

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the

the Inquisition was per Sacramentum probor. & legal. hominum Com. predict. whereas by the Stat. of 4. E. 1. this inquest ought to be by men of the four Towns next adjoining, and this ought to appear in the Inditement also Hill. 10. Jac. Rot. 3. Co. lib. Intr. 354. And day was given to the Attorney General, to maintain this Inquisition: But after wards Pasch. 3. Car. the Inditement was quashed, especially for the first exception.

The same Term in the same Court,

King *versus* Merrick.

In an Action upon the Case for these words, I charge you King with Felony, and you Constable (inuendo Thomas Legat) to apprehend him: And a verdict for the Plaintiff. It was moved in arrest of Judgement by Bacon, that the words are not actionable: The first words are not, because they are not an expresse affirmation, and for this he cited Mich. 11. Jac. in this Court Powel and Bauds case, where an action was brought for these words, I have arrested Powel of Felony, for stealing sheep of mine, and adjudged not actionable.

Also the Plaintiff did not shew in his Declaration what kinde of felony this was, and it may be such a felony for which an Action will not lie; for there are divers kinds of felony, and a Mayhem is one kind, as appears in 40. Ass. Pl. 4. 6. H. 7. 1 and in this case it shall be taken in mitiori sensu, and it shall not be intended such a felony for which he may be hanged: If one charge another with felony, because he hath committed a Mayhem, it is cleer that an action will not lye.

And the other words, (I charge you Constable to apprehend him) are not actionable, and the words are onely spoken to the Plaintiff: Also the words are layd to be spoken in London, and it appears that the Constable was of a Town in Norfolk, who cannot apprehend any one in London. Earle for the Plaintiff. It hath been argued that the words are not actionable, because felony is a generall word and contains in it selfe a mayhem also; But I conceive that in this case felony shall be taken according to the general and common acceptation, which is such a felony for which a man may lose his life, and for this he cited Co. lib. 4. 15. b. Yeomans charged Hext, for my ground in Allerton Hext seeks my life, and if I could find John Silber, I do not doubt but within two dayes to arrest him upon suspicion of Felony: and it was adjudged that for the last words the Action lies; because he shall be imprisoned for suspicion of felony, and felony is there taken according to the common acceptation of the word.

It hath been objected that there is no expresse affirmation of the felony, but I conceive that there is, 39. Eliz. Action was brought for these words; I will call him in question for poysoning my Aunt, and adjudged that it lyes, and Mich. 37. and 38. Eliz. Woodrofe and Vaughans case for these words: I did not know Mr. Woodrofe was your Brother, I will prove him perjured, or else I will bear his charges: and adjudged actionable. And Hill. 44. Eliz. Rot. 351. This man (inuendo John Latham) hath cut my Wives purse, and his Father knowing, of it received it of him, and the Money and Rings therein, and therefore I charge him of flat Felony: and resolved that for these words, (did cut my Wife's purse) no action lies, for the cutting of ones purse only is not felony, unless it be taken from the person; and to receive one is not felony, but resolved that the last words were actionable, and then it

it was agreed, that if one say, that I. S. did see such a one that had committed felony, and did suffer him to slip away, I charge him of felony, these words are not actionable, and Mich. 20. Jac. in this Court that these words (beare witnesse, I arrest him of felony) are actionable, and therefore he prayed judgement for the Plaintiff. Doderidge Justice, the words are not actionable: And Hexts case comes not to this case, for there by the word (Felony) it was manifest what felony he intended by the circumstances of the speech; to wit, that he ment such felony, for which he might lose his life; but the words here being generall of felony, it may be intended as well of a Mayhem as of any other felony; for in an appeal of Mayhem, he is arraigned as Felo Domini Regis 40. Ass. and the other case of 44. Eliz. I do arrest him of flat Felony, is not consonant with the reason of this case, for there by the arrest, his liberty is taken away, but in this case there is no restraint, and it is very hard to make these cases agree together, for words are as variable as the faces of men &c. Jones Justice agreed, and he took it for a generall rule, that where words carry a double sense, and there is nothing to guide the sense more one way then another, there the words are not actionable, for finis est legis dirimere lites: And therefore if one saith of another, that he hath the Pox, because the sense is ambiguous, it shall be interpreted in mitiori sensu, and therefore the words are not actionable, so if one sayes of another, that he hath stolen his Apples, or his Corn, because they may be Apples from the tree, or Corn in the field, the taking whereof is no felony: but it was adjudged in the Common-Pleas, when I was there, that these words viz. Thou art a Thief, and hast stolen my Corn, are actionable, by reason of the addition of the word Thiefe.

So that the speaking of words of a double sense are not actionable, unlesse ex antecedentibus, or consequentibus, it can be collected that the words were spoken in pejori sensu: Then the words in this case (I charge you with Felony) peradventure intend such a felony, for which he shall recover damages only, which is Mayhem, and therefore no action will lie. These words (Thou art forsworn) are not actionable, because forswearing may be in ordinary communication, or in a Court of Justice, and it shall be taken in mitiori sensu: but if he sayes, Thou art forsworn in a Court of Record, it is actionable, and if in this case he had charged him with felony, and sayd further that he had stolen, &c. they would have been actionable, but here he only charges him with felony, which is an ambiguous word; and also it is no direct affirmation, and therefore not actionable, and Judgement was given Quod querens nil capiat per Billam.

The same Term in the same Court.

Goods Case.

Good and his Wife brought a Writ of Error upon a Judgement, given in the Court of the Castle of Windsor, in an Action of Debt there, which was entered Trin. Mich. 2 Car. Rot. 119. 120. and two Errors were assigned. 1. Because the Judgement there is given in these words, *ideo consideratum adjudicatum, & assessum est*, whereas it ought to be onely by the word *consideratum*, and the Judgement being the act of the Court, the Law is precise in it, and therefore it hath been resolved, that a Judgement given by the word (*concessum*) is not good, but it ought to be by the word (*consideratum*)

2. The

2. The costs *ex incremento*, are not said to be given, *ad petitionem quarentis*, as it ought to be, for *beneficium nemini obtruditur*, and therefore it hath been resolved in this Court, that an alien born shall not have *medietatem lingua*, if he does not request it, and as to this it was answered of the other side, that costs ought alwayes to be assessed *ex petitione quarentis*, and albeit here the request of the Plaintiff was not precisely put to increase of the costs, yet at the beginning of the Judgement it is said, *Ideo ad petitionem quarentis consideratum. &c.* And that costs shall be given *ex incremento*, so that this request goes to all the Sentence, and by the unanimous opinion of all the Court, the Judgement was reversed for both the Errourrs, for 1. *Ideo considerat. adjudicat. &c.* is not good, the Judgement being the A& of the Court, and the Law hath appointed in what words it shall be given, and if other words should be suffered, great incertainty and confusion would ensue, and needlesse verbosity is the mother of difficulty. 2. The increase of costs ought to be given *ad petitionem quarentis*, and the words (*ad petitionem quarentis*) being misplaced, will not supply this defect, and Damages *ex incremento* is alwayes given *ad petitionem quarent.* for as Bracton saith, *Omne iudicium est trinus actus trium personarum, iudicis, actoris, & rei*, and if in this case, the usuall form should not be observed, all would be in a confusion, and in as much as the words are misplaced, it is as if they had not been put in at all, and therefore void, like to a case put in *Walsinghams case in Plowden*, where an averrement misplaced, is, as if there were none: In this case the Judgement was reversed, and *Trin. 3 Car. in B.B.intr.Hill 2 Car.Rot.849.* a judgement was reversed, because it was *Ideo concessum & consideratum est.*

FINIS.

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F I N I S.

Cy 17.12.14/103.



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